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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JESSE J. SANCHEZ,
Petitioner,
vs.
CITY OF SANTA ANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this court should issue a writ of certiorari because the Ninth Circuit, contrary to decisions in other circuits, concluded that a state workers' compensation award precluded litigation in federal court of federal claims and issues that could not have been litigated in the state proceedings?

A. Whether a writ of certiorari should be granted because the Ninth Circuit conflicts with other circuits in applying the exclusive remedy provision under California's Workers' Compensation Act to limit civil rights claims?

B. Whether this court should issue a writ of certiorari because the Ninth Circuit has erroneously applied claim preclusion to bar federal civil rights claims that could not have been litigated in any prior state proceeding?

C. Whether this court should issue a writ of certiorari because there should be no preclusive effect from a prior state judgment in which the state court was unable to address the merits of the claim or issue being litigated in a federal civil rights action?

II. Whether this court should issue a writ of certiorari because the affirmative defense of preclusion was first presented in a post-trial motion after the party asserting it had already asserted and obtained a setoff from the prior adjudication?

III. Whether this court should issue a writ of certiorari on whether petitioner is entitled to some award of attorneys' fees and costs on appeal in defense of his verdict below where petitioner has an absolute right to at least some attorneys' fees in the district court?

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OFFICIAL REPORTS OF OPINION HEREIN

The opinion below appears as follows in the official reports of the United States Court of Appeal: Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990). [Appendix B].

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. sec.1254 and United States Supreme Court Rule 10.1(a) & (c) this Court has jurisdiction to consider this petition for writ of certiorari to review the decision of the Court of Appeal for the Ninth Circuit. Jurisdiction in the district court was based on 42 U.S.C. sec.1983 and 28 U.S.C. sec.1343. The Ninth Circuit entered judgment on September 25, 1990. A timely petition for rehearing to the Ninth Circuit was denied on February 22, 1991.

STATUTORY PROVISIONS AND POSSIBLE APPLICABILITY OF 28 U.S.C. secs.2403(a) or 2403(b)

This case requires construction of the relationship between California Labor Code secs.3600, 3602 [Appendices K & L] and 42 U.S.C. sec.1983. If certiorari is granted, 28 U.S.C. secs.2403(a) or 2403(b) may be applicable.

STATEMENT OF THE CASE

Jesse J. Sanchez, petitioner-appellee-plaintiff, is a Mexican American police officer who was hired in 1975 in response to a Title VII lawsuit filed against the Santa Ana Police Department [SAPD][1]. This petition concerns a claim by petitioner in United States District Court under 42 U.S.C. sec.1983 that his property interest in his merit pay was deprived without due process of law, and the preclusive effects, if any, of a prior adjudication in a California workers' compensation proceeding.

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[1] See League of United Latin American Citizens [LULAC] v. City of Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976).

In 1977-78, petitioner and other Mexican American police officers complained, within SAPD and to various federal and state agencies[2], that they and members of the Mexican and African American communities were discriminated against on the basis of race, and that SAPD responded to their expression of their concerns with additional retaliation and harassment.

In March[3] and May 1979, petitioner filed a California workers' compensation claim asserting work-related emotional injury and disability, arising in March 1979. In September of 1979, petitioner resigned from the SAPD. Thereafter, petitioner amended his workers' compensation claim to include a contention of permanent disability. [ER 913-17].

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[2]. The Equal Employment Opportunity Commission, the Law Enforcement Assistance Administration, and the California Fair Employment Practices Commission.

[3]. This claim was dismissed by stipulation as redundant to the second claim [ER 916-17].

The Workers Compensation Appeals Board [hereinafter "WCAB] entered its judgment on November 12, 1981. [Appendix D16]. "Pursuant to the parties' stipulation, the appeals board found that Sanchez's stress-related injuries caused a permanent disability of 30% and awarded him $8,662.50[4] for the period between the City's removal of Sanchez's merit pay in March 1979 and Sanchez's medical leave of absence in May 1979. The appeals board further determined that it lacked the authority to award pay during Sanchez's leave of absence and that his resignation on September 10, 1979 precluded his claim for entitlement to further benefits." [Appendix D16[5]]. Respondent had contended, and based on that contention the WCAB had ruled, that the WCAB "does not have jurisdiction to award and compel the payment of leave of absence pay pursuant to the provisions of Labor Code sec.4850" and that petitioner's "resignation . . . precludes him from any entitlement to further benefits" [ER 1103-08] (emphasis added).

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[4]. This was the total award received.

On May 20, 1979, petitioner and two other Mexican American officers[6] filed an action against respondent-appellant-defendant City of Santa Ana[7], asserting petitioner's due process claim, and further claiming that defendants violated their

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[5]. Both parties to this petition filed petitions for rehearing from the panel opinion below, without disputing this portion of the panel's description of the record below.

[6]. The claims of plaintiffs Victor Torres and Robert Caro are addressed in a separate opinion of the Ninth Circuit, see Sanchez v. City of Santa Ana, (9th Cir.

July 11, 1990), as modified, (9th Cir. February 27, 1991) [hereinafter "Sanchez II"] [Appendices F & G], and those claims are not pertinent to this petition. A petition for rehearing by plaintiffs-appellants in Sanchez II, in which the Ninth Circuit has affirmed in part and reversed in part the lower court judgment, and remanded for a new trial, is currently pending in that companion opinion. A further petition to this Court may be filed from that judgment as well. Most of the numerous district court orders relate to this much broader opinion and are not pertinent to the issues raised in this petition, and petitioner has appended only those relating to the instant opinion.

[7]. The other named defendants were Raymond C. Davis, Chief of Police; Personnel Director Donald Bott; Captain E. B. Hansen; Captain Robert Stebbins; Lt. Michael Lewellen; Lt. Oliver Lee Drummond; Lt. Dale Sterzer; Lt. Norwood Williams; Lt. Lawrence Pitzer; Sgt. Gary Dixon; Sgt. John Collins; Sgt. William Bruns; Sgt. John Collins; Sgt. Richard Faust; Sgt. James McDaniels; Sgt. Michael Lanners; and Sgt. John Dittus. The claims involving these other defendants and other claims involving respondent, addressed in Sanchez II, are not pertinent to this petition.

rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, secured by 42 U.S.C. secs.1981, 1983, 1985 & 1986. [Appendices F & G[8]]. Petitioner's complaints expressly alleged emotional distress damages, "a medically diagnosed stress reaction," and a "constructive discharge" [ER 11-12, 26-28].

Respondent had not asserted claim or issue preclusion in any of its Answers or its numerous dispositive motions filed before and after November 1981. [CR 3, 11, 28, 39, 43-46, 63]. Respondent, in filing several Pretrial Memoranda of Contentions of Fact and Law in January 1982 and June 1982, did not assert any defense of preclusion. [CR 91, 113]. Similarly, in

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[8]. The other claims of petitioner are addressed in Sanchez II, and are not pertinent to this petition, except as to the denial of attorneys' fees and costs on appeal herein.

Joint Pretrial Conference Orders filed June 21, 1982 [CR 116] and July 17, 1984 [CR 368], the latter amended on motion of defendants, respondent defendant City failed to raise or preserve the affirmative defense of preclusivity based on the WCAB award that was final on November 11, 1981.

On June 3, 1983, the district court entered partial summary judgment in favor of petitioner on his due process claim as to both respondent and Chief Davis, finding that there was a complete denial of due process in the removal of petitioner's merit pay, reserving for trial the scope of damages, and made findings of fact[9] and conclusions of law. [Appendix H]. Prior to the damages phase of trial, respondent twice unsuccessfully sought reconsideration of the partial summary judgment[10], without once asserting any preclusion defense [RT 4026-41; CR 587-89].

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[9]. Respondent did not contest the facts as presented in the motion, instead merely asserting that there was no due process violation as a matter of law. [CR 127-32, 147, 155, 158].

On June 18, 1985, following three (3) months of trial, the district court directed a verdict on all remaining plaintiffs' claims [CR 585]. See Sanchez II, supra. The damages phase on petitioner's due process violation was then set for trial before the same jury[11] in October 1985.

On October 1, 1985, respondent, the only remaining defendant, filed a "Trial Brief re Allowable Damages of Plaintiff

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[10]. Reconsideration was granted as to Chief Davis, the district court declaring that the "actions taken by defendant Davis cannot be reasonably found to be in violation of clearly established law" entitling him to immunity. [ER 428].

[11]. The parties stipulated to keep the same jury due to overlapping evidence.

Sanchez," claiming for the first time that the WCAB award was either "res judicata" as to petitioner's claim for damages for emotional injury and distress, or, alternatively, that it should be applied as a setoff against any damages awarded by the jury. [CR 617; ER 1091-1108]. Petitioner objected that this defense had not been timely and properly plead, or otherwise presented by proper motion. [CR 620].

At trial, the parties stipulated to the cost of backpay, benefits and prejudgment interest of $145,073, with a stipulated setoff of the full $8,662.50 received from the WCAB decision, and evidence was submitted to the jury on the issue of constructive discharge, future pay, and emotional damages incurred by petitioner[12]. [Ex 650; ER 1015]. The jury found a constructive discharge occurred in September 1979, and awarded $400,000. for lost back and future pay, including interest and benefits, and $500,000. for emotional injury and distress, and judgment thereon was entered November 12, 1985 [Appendix D5 & I].

At the damages phase of the trial, respondent made no motion for directed verdict at all, and did not present any motion asserting the preclusivity defense. On November 22, 1985, respondent made timely motions for a new trial and judgment notwithstanding the verdict, seeking therein for the first and only time a ruling that the civil rights award was precluded by the WCAB award. [ER 1073-

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[12]. Respondent submitted no evidence in response to three (3) days of evidence, including several expert witnesses, presented by petitioner.

1102]. The district court denied those post-trial motions without explanation or elaboration, and final judgment was entered July 23, 1986 [Appendix J]. The district court later denied petitioner's motion for attorneys' fees and costs as part of a ruling in which it awarded attorneys' fees to defendants[13].

Both sides appealed from the final judgment [CR 794; ER 454-55] and both sets of appeals were briefed in a consolidated briefing schedule. Two (2) separate opinions were issued by the Ninth Circuit on July 11, 1990. [Appendices A & F]. The opinion in this matter affirmed the partial summary judgment on the due process violation and the jury finding that petitioner was constructively discharged;

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[13]. This issue was briefed and decided by the Ninth Circuit panel in the companion appeal. See Sanchez II, supra.

and affirmed the jury award of $400,000 in back and future pay -- i.e. the award that included the offset of 100% of the WCAB award. [Appendix A].

The Ninth Circuit, however, reversed the emotional injury and distress damages award of $500,000, interpreting California law as providing that its Workers' Compensation Act is an exclusive remedy against an employer for work-related injuries.[14] The Ninth Circuit excused respondent's failure to submit earlier the defense of preclusivity, and ignored the fact that respondent had elected at trial to seek, and in fact obtained by stipulation, a 100% offset of the WCAB damage award from petitioner's lost income award. [Appendix A16-17]. The Ninth Circuit also ruled that neither party was entitled to attorneys' fees or costs on appeal[15].

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[14]. The panel ruled: "California law provides that if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided thereunder constitute the exclusive remedy against the employer. See Cal. Labor Code sec.3601; Hollywood Refrigeration Sales Co., Inc. v. Superior Court, 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). Work-related emotional injuries are fully compensable under the Workers' Compensation Act, Giorgi v. Verdugo Hills Hospital, 210 Cal.App.3d 252, 272 (1989). Indeed, Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award of $500,000. for emotional distress." [Appendix A17].

Because a state case on which the Ninth Circuit relied had been depublished by the California Supreme Court, the Ninth Circuit withdrew the opinion herein and ordered supplemental briefing thereon. [Appendix B & C]. On September 25, 1990, the Ninth Circuit re-issued its opinion herein, with only a single change, deleting the following sentence and citation: "Work-related emotional injuries are fully compensable under the Workers' Compensation Act, Giorgi v. Verdugo Hills Hospital, 210 Cal.App.3d 252 (1989)[16]."[Appendix D].

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[15]. This was consistent with the Ninth Circuit's initial ruling in the companion opinion, without any citation to authority or discussion, that the district court did not abuse its discretion in denying petitioner any attorney's fees because petitioner "came out of the case with adequate funds to pay his fees and costs." [Appendix F28].

Thereafter, petitioner filed a timely petition for rehearing including the issue of his entitlement to attorneys' fees and costs on appeal[17]. On February 22, 1991, the Ninth Circuit denied the petition for rehearing. [Appendix E]. On February 27, 1991, the Ninth Circuit modified the companion opinion to permit an award of attorneys' fees to petitioner on remand to the district court. See Sanchez II, supra. [Appendix G].

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[16] This deleted statement was directly contrary to another Ninth Circuit decision interpreting California law and which had thoroughly reviewed California Supreme Court and Appellate opinions on the subject, as well as the state authorities cited therein, which reached the opposite conclusion from Giorgi. See Miller v. Fairchild Industries, Inc., 876 F.2d 718, 729 & n.17 (9th Cir. 1989), cert. denied, 110 S.Ct. 1504 (1989) (and California cases cited therein).

ARGUMENT

I.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT, CONTRARY TO DECISIONS IN OTHER CIRCUITS, CONCLUDED THAT A STATE WORKERS' COMPENSATION AWARD PRECLUDED LITIGATION IN FEDERAL COURT OF FEDERAL CLAIMS AND ISSUES THAT COULD NOT HAVE BEEN LITIGATED IN THE STATE PROCEEDINGS

Petitioner is seeking this writ of certiorari under Supreme Court Rule 10(a) and (c). This petition presents questions of substantial importance concerning the interrelationship of "exclusive" remedy provisions of state workers' compensation systems with rules of preclusion from such proceedings to subsequent federal civil rights actions. This Court has not yet considered the application of preclusion rules in litigation under 42 U.S.C. sec.1983, arising from a prior adjudication in a workers' compensation system which:

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[17]. This was predicated on petitioner's then pending petition for rehearing in the companion opinion, addressed to the denial of attorneys' fees and costs in the district court.

(a) excludes all other claims and remedies, including civil rights claims;

(b) substantially limits the scope and extent of those remedies which are made available.

One of these questions -- the exclusive remedies provisions that accompany the workers' compensation systems which exist in all of the states in the union -- also presents an issue on which the circuits are divided. The Ninth

Circuit applied this exclusive remedy provision in the instant case, with approval, to support its holding that claim preclusion should apply from the prior WCAB proceeding to preclude one element of damages -- emotional distress -- flowing from the deprivation of petitioner's due process rights. The Second and Tenth Circuits, by contrast, have held that the underlying policies of the civil rights acts and the supremacy clause bar the federal courts from giving effect to such state exclusive remedy provisions.

The following discussion addresses the three (3) component parts of the issue, as presented by the facts and lower court rulings in the instant case:

(a) Resolution of the conflict in circuits over whether the exclusive remedy provisions of state workers' compensation systems should be afforded any legal effect whatever in the subsequent availability of federal remedies for claimed civil rights violations under 42 U.S.C. sec.1983;

(b) Resolution of whether preclusion in a federal sec.1983 action from a prior state workers' compensation proceeding should be limited to issue preclusion, because of the substantial limitations and exclusions in workers' compensation systems which prohibit the litigation of civil rights and all other fault-based claims;

(c) Resolution of whether preclusion in a sec.1983 action from a prior state workers' compensation proceeding should not be applied to the extent that the prior adjudication is based on the determination that the state forum lacks jurisdiction or authority to decided the claims or issues on the merits.

A. WHETHER A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT CONFLICTS WITH OTHER CIRCUITS IN APPLYING THE EXCLUSIVE REMEDY PROVISION UNDER CALIFORNIA'S WORKERS' COMPENSATION ACT TO LIMIT CIVIL RIGHTS CLAIMS

Petitioner respectfully requests that this Court issue a writ of certiorari to resolve the conflict among the circuits, created by the instant decision of the Ninth Circuit, in which it employed the exclusive remedy provision of its state's workers' compensation system as part of the basis for precluding in a federal forum a substantial portion of the remedy otherwise available under 42 U.S.C. sec.1983 for a federal constitutional deprivation.

Workers' compensation statutes, such as the one in California, provide a system of limited compensation for employment injuries in which: (1) proof of fault is not required, and the only elements are an injury that is work-related; and (2) all fault-based civil claims in state courts are barred under its "exclusive remedies" provisions, unless the injury is not compensable under the workers' compensation system. See California Labor Code secs.3600 & 3602 [Appendices K & L]. Thus, federal civil rights claims against the employer, which are clearly "fault-based," City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22 (1988); Pembaur v. City of Cincinnati, 475 U.S. 452 (1986), cannot be litigated in a workers' compensation proceeding, and are also precluded in the state courts under the exclusive remedy provision as long as the injury in question is compensable under workers' compensation[18], see Cole v. Fair

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[18]. There has been some suggestion in California cases that civil rights claims might not be excluded under the California workers' compensation system, relying on a distinction that intentional acts are not excluded. See Semore v. Poole, 217 Cal.App.3d 1087, 266 Cal. Rptr. 280 (4th Dist. 1990); Hart v. National Mortg. & Land

Oaks Fire Protection Dist., 43 Cal.3d 148, 233 Cal. Rptr. 308, 315 (1987).

The California Workers' Compensation Act thus excludes any civil claims in any of California's courts or WCAB tribunals, for wrongful termination, unlawful retaliation, or workplace harassment, even for acts that flagrantly violate the United States Constitution. See id., 233 Cal.Rptr. 314-16. More precisely, the California workers' compensation system bars employees from litigating, under 42 U.S.C. sec.1983, their constitutional claims arising from the employment relationship, whether before

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Co., 189 Cal.App.3d 1420, 1431, 235 Cal.Rptr. 68 (4th Dist. 1987), review denied in Supreme Court (1987); Renteria v. County of Orange, 82 Cal.App.3d 833, 839, 147 Cal.Rptr. 447 (1978). However that distinction based on intent was rejected by the California Supreme Court, choosing instead a criterion based on whether the particular act of the employer occurred as a normal incident of employment. See Cole, supra, 233 Cal.Rptr. at 314-16.

the WCAB or in a civil action for damages.

This is plainly and unequivocally inconsistent with the ruling of a unanimous Court in Howlett v. Rose, 110 S.Ct. 2430, 2438-39, 2443, 2447 (1990). In Howlett, this Court concluded that a state cannot, consistent with the supremacy clause, refuse to litigate federal claims under sec.1983. Nor may a state condition or limit the pursuit of such federal claims in its own courts. See Felder v. Casey, 487 U.S. 131, 138-39, 153 (1988) (state tort claims notice provision may not be applied to sec.1983 claim); Martinez v. California, 444 U.S. 277, 284 n.8 (1980) (state immunity provision may not be applied to sec.1983 claim).

To permit a state statute which purports to limit any federal right of action "to have controlling effect would transmute a basic guarantee into an illusory promise," which the supremacy clause does not allow. See Martinez, supra, 444 U.S. at 284 n.8. A state statute cannot be applied to a federal claim if its "application would be inconsistent with the federal policy underlying the cause of action . . . ." Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975). Accord, Felder, supra, 487 U.S. at 138-39; Robertson v. Wegman, 436 U.S. 584, 590-91 (1978). Federal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest . . . .'" Burks v. Lasker, 441 U.S. 471, 479 (1979).

The purposes and underlying policies of 42 U.S.C. sec.1983 are to deter state action which deprives individuals of federally protected rights and to compensate those damaged by such state action. See Felder, supra, 487 U.S. at 141; Owen v. City of Independence, 445 U.S. 622, 636, 651-52 (1980); Robertson, supra, 436 U.S. at 590. Those purposes and policies are also defeated when the exclusive remedy provision of a workers' compensation scheme is applied to limit a person's ability to pursue federal remedies, not only in the state forum but in a federal forum as well. See Rosa v. Cantrell, 705 F.2d 1205, 1220-21 (10th Cir. 1982), cert. denied, 464 U.S. 821 (1983). Although the application of rules of preclusion do not in principle undermine the policies underlying sec.1983, an application of those rules in conjunction with a state mandated exclusive remedy provision that reduces the remedies available under federal law would in fact undermine those policies.

Thus, the Second Circuit has declared that

> "a state statute's exclusivity provision may [not] bar a federal civil rights action. See Rosa v. Cantrell . . . .Conduct that is wrongful under section 1983 cannot be immunized by state law. [Citation omitted]."

McClary v. O'Hare, 786 F.2d 83, 85 (2nd Cir. 1986). The Tenth Circuit, addressing a factual circumstance in which the plaintiff had actually received an award under a state workers' compensation proceeding, as in this case, nevertheless held that:

> "The exclusive remedy of state Workers' Compensation statutes does not bar recovery against an employer under sec.1983. . . .
>
> "The simple answer to the defendant's argument that Rosa's acceptance of Workers' Compensation bars any recovery under sec.1983 because the state has pronounced workmen's compensation to be an exclusive [remedy] is that the state law conflicts with the remedy provided by sec.1983 and therefore it must be superseded in this lawsuit."

Rosa, supra, 705 F.2d at 1221. The Eleventh Circuit reached the same conclusion in respect to another federal remedial statute. See Barrett v. Adams Fruit Co., Inc., 867 F.2d 1305, 1310-11 (11th Cir. 1989). That Court, noting that workers' compensation does not fully remedy an employee, dismissed concerns about double recovery by noting that the workers' compensation recovery can be offset against the recovery under the federal claim, id., 867 F.2d at 1311, the very thing that was done in this case[19].

This "exclusive remedy" defense was properly rejected by the district court, and improperly used by the Ninth Circuit as part of its rationale in setting aside the emotional distress damages verdict. The Ninth Circuit thus now stands as the only circuit in this country, in fact the only federal court of any kind, to hold that such an exclusive remedy provision can be applied in any manner to bar or limit the remedies available under the civil rights acts, or, for that matter, under any federal remedial statute. In order to resolve this fundamental issue, and the conflict between the circuits, petitioner respectfully urges this Court to issue a writ of certiorari and accept this issue for hearing.

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[19]. Indeed, because of that offset against the lost income award, done by stipulation of the parties, petitioner herein has received no benefits from the workers' compensation action at all.

B. WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT HAS ERRONEOUSLY APPLIED CLAIM PRECLUSION INSTEAD OF ISSUE PRECLUSION FROM A WORKERS' COMPENSATION PROCEEDING TO FEDERAL CIVIL RIGHTS CLAIMS

Petitioner respectfully urges this Court to issue a writ of certiorari so that it may address an issue of fundamental importance nationally: whether only issue preclusion should apply in a federal sec.1983 action from a prior state workers' compensation proceeding, and not claim preclusion, because of the essentially limited nature of those state proceedings under which federal civil rights claims cannot be litigated at all.

"Preclusivity" rules clearly are applicable to federal civil rights actions. See 28 U.S.C. sec. 1738 (federal courts must give full faith and credit to state court judgments); University of Tennessee v. Elliott, 478 U.S. 788, 796-99 (1986) (issue preclusion from prior state administrative findings that were not reviewed by a state court); Migra v. Warren City School Dist., 465 U.S. 75, 83-84 (1984) (claim preclusion from prior state court action); Kremer v. Chemical Construction Co., 456 U.S. 461, 473-78 (1982) (claim preclusion from prior state administrative determination reviewed by state court); Allen v. McCurry, 449 U.S. 90, 95 (1980) (issue preclusion from prior state criminal action).

However, the Supreme Court has distinguished between claim and issue preclusion[20] as follows:

> "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. [Citation omitted]. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. . . . [T]his opinion utilizes the term 'claim preclusion' to refer to the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit."

Migra, supra, 465 U.S. at 77 n.1.

Thus, under claim preclusion, anything

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[20]. The Supreme Court has expressed a preference for the terminology of "claim preclusion" and "issue preclusion" in lieu of the older terms "res judicata" and "collateral estoppel," respectively. See Migra, supra, 465 U.S. at 77 n.1.

which was litigated or could have been litigated in the prior proceeding is precluded in the subsequent proceeding. See Migra, supra, 465 U.S. at 83-84; Kremer, supra, 456 U.S. at 473-78; Trujillo v. County of Santa Clara, 775 F.2d 1359, 1363-66 (9th Cir. 1985) (applying California law); Scoggin v. Schrunk, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) (same). Under issue preclusion, only those matters actually litigated are precluded. See Elliott, supra, 478 U.S. at 796-99; Allen, supra, 449 U.S. at 95; Eilrich v. Remas, 839 F.2d 630, 633-34 (9th Cir. 1988) (applying California law).

Following this distinction, this Court has held that claim preclusion applies to administrative decisions that have been reviewed in state courts, in which forum the subsequent civil rights plaintiff raised or could have raised the claims offered in the federal civil rights action, see Kremer, supra, 456 U.S. at 473-78, but that only issue preclusion applies for fact-finding in an administrative forum which was not judicially reviewed, and in which the civil rights claims for affirmative relief could not have been raised, see Elliott, supra, 478 U.S. at 796-99.

This Court similarly ruled that only issue preclusion applies from a prior criminal proceeding in which the subsequent civil rights plaintiff could not raise any civil claims for affirmative relief, but in which the issue of "probable cause" was actually litigated. See Allen, supra, 449 U.S. at 95. And this Court has held that claim preclusion will apply from a prior state court judgment in which state claims were litigated and the federal claims could have been raised as well. See Migra, supra, 465 U.S. at 83-84.

This Court has summed up this analysis recently:

> "[A] federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding. (Citation omitted).
>
> "With respect to matters that were not decided in the state proceedings . . . claim preclusion generally does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.' (Citation omitted)."

Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 382 (1985).

As discussed above, workers compensation statutes, such as the one in California, provide a system of limited compensation for employment injuries in which fault-based claims are barred under its "exclusive remedies" provision. See e.g. California Labor Code secs.3600 & 3602; Barrett, supra, 867 F.2d at 1310-11. These statutes, on their face and as applied herein, therefore bar an employee from raising fault-based federal civil rights claims against the employer in a workers' compensation action.

Therefore, it cannot be fairly concluded that petitioner could have raised his federal due process and constructive discharge claims before the WCAB. In those proceedings, the only issues are whether there are injuries that are work-related, and traditional common law remedies -- e.g. compensatory and punitive damages and injunctive relief -- are unavailable. See e.g. California Labor Code secs.3600 & 3602; Barrett, supra, 867 F.2d at 1310-11.

Nor is a mere element of damages, flowing from a federal claim, itself a "claim" which could have been raised in the prior state proceeding. Nor is "emotional injury" a claim independently cognizable under 42 U.S.C.sec.1983. Emotional distress damages caused by a deprivation of a property interest in a public employee's job may be awarded by a jury only once it has found first that a due process violation occurred, and that the adverse personnel decision would not have been made in the absence of the due process violation. See Carey v. Piphus, 435 U.S. 247, 266-67 (1978).

The Ninth Circuit herein has in effect precluded a substantial element of petitioner's due process and constructive discharge claims, by precluding "issues" -- related to the emotional distress element of damages -- that were never actually litigated in the prior WCAB proceeding. Indeed, the Ninth Circuit panel herein did not conclude that petitioner could have raised these matters in the prior state WCAB proceeding, relying instead on the very provision which prevented petitioner from doing so in the WCAB proceeding: the exclusive remedy provision. This is a result never contemplated or intended by preclusion rules or the public policies they serve.

Petitioner is not contending that there should be no preclusion at all from a prior state workers compensation proceeding. Petitioner contends that only issue preclusion should apply, as with other limited forums, as it is patently clear that he could not raise his federal claims in the prior WCAB proceeding. It simply makes no sense to say that a claim is precluded from further litigation because it "could have been litigated" in the prior proceeding when the workers' compensation statute plainly bars such claims from litigation before the WCAB.

Moreover, permitting claim preclusion generates absurd results. For instance, under the rule enunciated by the Ninth Circuit herein, if an employee suffers a work-related physical injury unrelated to any federal claim, and a work-related emotional injury related to a federal claim, he would be faced with the following Hobson's choice:

On the one hand, he could seek the more limited WCAB remedy for the physical injury. Having done so, he then "could" also seek compensation in the same action for the unrelated emotional injuries. He would thereby be "precluded" from seeking, in a federal claim in a federal forum, those sec.1983 remedies -- compensatory and punitive damages and injunctive relief -- which are the essence of the remedial purposes of the federal statute.

On the other hand, in order to preserve his right to seek traditional sec.1983 remedies in his federal claim, including emotional injury and distress damages, he would have to abandon any effort to obtain any damages or compensation for the physical injury. He would have to do so because of a combination of state law, which excludes his resort to civil courts other than the WCAB, and the rule enunciated herein by the Ninth Circuit, which has converted that rule of exclusion into a rule of preclusion, without any semblance of state or federal authority.

The employee would have no other choice. Thus, preclusion principles as applied by the Ninth Circuit herein would compel, a priori, the employee to surrender either a significant element of damages in his federal claim, or his entire state claim for an unrelated physical injury, thereby depriving the employee of a substantial claim without any semblance of due process of law.

The purpose of preclusion principles is to "enforce repose" thereby applying the "'obvious principle that a controversy should be resolved once, not more than once.'" see Elliott, supra, 478 U.S. at 798 & n.6. "This value . . . encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." Id., 478 U.S. at 798. The purpose is not to deprive a good faith litigant of his right to have all of his legitimate federal civil rights claims litigated at least one time, with its full panoply of available remedies to make him whole and vindicate the public purposes underlying sec.1983; nor is the purpose to burden a litigant's right to elect a federal forum by forcing him to abandon other unrelated state claims.

The policy purposes behind preclusion can be adequately served by applying issue preclusion from state workers' compensation proceedings. A civil rights plaintiff would be precluded from relitigating any issues actually litigated in the prior state workers' compensation proceeding, including those issues actually litigated concerning emotional injuries suffered.

And, unlike the circumstance presented in Migra, the civil rights plaintiff will not be presenting any claims which could have been raised and litigated fully and fairly in the prior state proceeding. He will be permitted to litigate his federal claims fully, and to obtain all of the damages naturally flowing therefrom, except to the extent that he has already actually litigated on the merits any issue relating to those damages.

Therefore, petitioner respectfully urges this Court to grant certiorari on the question of whether claim preclusion should be applied in federal actions under sec.1983 in respect to matters not actually litigated in a prior workers' compensation proceeding. This is an issue which is of fundamental importance in virtually every state.

C. WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THERE SHOULL BE NO PRECLUSIVE EFFECT FROM A PRIOR STATE JUDGMENT IN WHICH THE STATE COURT WAS UNABLE TO ADDRESS THE MERITS OF THE CLAIM OR ISSUE BEING LITIGATED IN A FEDERAL CIVIL RIGHTS ACTION

Petitioner urges this Court that an important question of law is presented as to the whether and to what extent claim or issue preclusion rules should be applied in a federal sec.1983 claim from a state action in which the state tribunal ruled that it lacked jurisdiction or authority to decide some or all of the claims or issues before it.

As noted above, claim preclusion rules do not generally apply to preclude a plaintiff from pursuing a federal action if the plaintiff in the prior proceeding "was unable to rely on a certain theory of the case or to seek a certain remedy because of limitations on the subject matter of the courts." Marrese, supra, 470 U.S. at 382. Accord, Trujillo, supra, 775 F.2d at 1363-66 (applying California law). And if the forum states own rules "includes this requirement of prior jurisdictional competency, which is generally true," then there is no claim preclusive effect. Cf. Marrese, supra, 470 U.S. at 382. Similarly, under rules of issue preclusion, a subsequent forum is precluded from relitigating an issue previously litigated if the prior forum "'resolve[d] issues of fact properly before it which the parties have an adequate opportunity to litigate.'" See Elliott, supra, 478 U.S. 799 (emphasis added); Eilrich, supra, 839 F.2d at 633 (same rule under California law).

Clearly, then, if petitioner was barred for jurisdictional reasons from presenting a particular theory of the case, from seeking a particular remedy, or from litigating a particular issue, then neither claim nor issue preclusion should apply. Yet, despite noting that the WCAB had found that it could not award damages from May-September 1979, and that it lacked jurisdiction to consider any injuries or damages occurring after petitioner's constructive discharge in September 1979, the Ninth Circuit herein ruled that petitioner was precluded from presenting any issue of such damages in the federal action[21].

This Court has declared that "at common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." Costello v. United States, 365 U.S. 265, 285-86 (1961). The Ninth Circuit has itself concluded in similar contexts that there is a rule that issue preclusion does not apply when the prior adjudication was not reached on the merits, see Trujillo, supra, 775 F.2d at 1363-66; and that a party cannot assert claim preclusion from a prior judgment if the previous claim was dismissed without consideration of the merits, the prior court having declined jurisdiction on the urging of the party later seeking to assert claim preclusion, see Piatt v. MacDougall, 773 F.2d 1032, 1034-35 (9th Cir. 1985) (en banc).

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[21]. The Ninth Circuit relied on Hollywood Refrig. v. Superior Court, 164 Cal.App.3d 756, 210 Cal.Rptr. 619 (1985) which held that when the WCAB decides the issue of "compensability" by workers' compensation, that issue is itself precluded from relitigation in a subsequent action. See id., 164 Cal.App.3d at 759. To the extent that that authority was applied to this case, it should have resulted in the preclusive acceptance of the conclusion that petitioner had not litigated, nor been able to litigate, his damages occurring after May 1979, nor any of those damages flowing from his constructive discharge in September 1979.

There is also substantial California authority that petitioner was not entitled to recover any damages under the WCAB under the "rule that an action against the employer for intentional infliction of emotional distress unaccompanied by physical harm is not barred because damages for such injuries are not cognizable under worker's compensation." Jones v. Kaiser Indus. Corp., 43 Cal.3d 560, 572-73, 237 Cal. Rptr. 568 (1987). Accord, Cole, supra, 43 Cal.3d at 156. See Miller, supra, 876 F.2d at 729-30 & n.17. The essence of the

California Supreme Court's holding in Cole, adopted by the Ninth Circuit in Miller, is that an employee should not be deprived of all remedies on a substantial civil claim[22]. Cole, supra, 43 Cal.3d at 155-56; Miller, supra, 876 F.2d at 729.

With preclusion applied to all of petitioners' emotional distress and injuries, not merely for the time period actually litigated on the merits, petitioner has been deprived of any forum at all for a litigation of those issues on the merits. This is particularly true in respect to the constructive discharge and the destruction of petitioner's police career, as also found by the jury in its award of lost income damages and affirmed by the Ninth Circuit. This act was completed on September 10, 1979, months after the period for which petitioner was compensated.

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[22]. The opinion in this matter, after deleting the depublished Giorgi citation and the reference to whether petitioner's injuries were in fact compensable under the workers' compensation system, ignored this entire string of California authorities, and the Ninth Circuit opinion in Miller. The opinion did so despite the undisputed fact that petitioner's injuries were exclusively emotional, instead relying solely on the exclusive remedy provisions and the fact that petitioner in fact received compensation for the two (2) month period stated in the opinion.

Damages on petitioner's contention that he was permanently disabled, raised before the WCAB only after his constructive discharge in September 1979, were denied based on the WCAB's lack of subject matter jurisdiction, at the express urging of respondent. Thus, the post-September 1979 emotional distress and permanent injury clearly were not in fact litigated on the merits at any time, except before the jury whose verdict the Ninth Circuit has set aside herein.

Petitioner sought damages in the

workers' compensation system in good faith. He was denied those damages based on a combination of (a) respondent's tortious conduct in effecting the constructive discharge after petitioner entered the workers' compensation system; and

(b) respondent's success in convincing the WCAB that the consequences of respondent's tortious conduct, occurring after petitioner entered the workers' compensation system, deprived that tribunal of jurisdiction to address damages caused by that unlawful conduct. If petitioner is now also deprived of his adjudication in the federal forum, then he has been denied the right to his day in court at least once, a fundamental denial of due process of law.

Nor does this case present a situation like that faced in Migra, supra, in which the plaintiff, dissatisfied with the remedies received in state court, sought additional remedies in federal court on the same factual claims. In Migra, the plaintiff had received relief for the entire period of her alleged injuries, and all of the relief which state law permitted following a ruling on the merits as to all of her claims and contentions.

In this case, petitioner has been effectively left without any remedy at all for any emotional distress or injuries for the period commencing in May 1979 and thereafter, and in particular for the permanent emotional injury and disability arising out of the constructive discharge in September 1979.

And in the end, respondent sought and received a 100% setoff from the lost income damages for the full amount received by petitioner from the WCAB proceeding, before ever presenting the preclusion defense.

Thus, petitioner has now received nothing from the WCAB proceeding, and respondent has paid nothing from the WCAB award.

Therefore, petitioner urges this Court to issue a writ of certiorari for the purpose of hearing and addressing the proper application of claim and issue preclusion rules in actions under 42 U.S.C. sec.1983 when the prior adjudication in a state court resulted in an adverse decision as to some or all of the claims and issues based solely on a lack of jurisdiction or authority to determine them on the merits.

II.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE AFFIRMATIVE DEFENSE OF PRECLUSION WAS FIRST PRESENTED IN A POST-TRIAL MOTION AFTER THE PARTY ASSERTING IT HAD ALREADY ASSERTED AND OBTAINED A SETOFF FROM THE PRIOR ADJUDICATION

Petitioner seeks a writ of certiorari on this issue based on Rule 10(a) & (c). The question presented is whether a defendant may assert the affirmative defense of claim or issue preclusion for the first time in a post-trial motion, after having elected to seek and having obtained a setoff from the prior adjudication. This issue is one of fundamental importance in the efficient and orderly administration of justice. It is also one on which the Ninth Circuit in this action has diverged from the rule applied in other circuits.

The affirmative defenses of claim and issue preclusion must be affirmatively plead in the district court. See F.R.Civ.P. 8(c). It must be asserted with specificity, alleging the specific claim or issue on which it is being asserted. See Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982). If the facts supporting the defense arose after the answer, it must then be raised at the earliest moment "practicable" in order to be asserted at all. See Home Depot, Inc. v. Guste, 773 F.2d 616, 620-21 n.4 (5th Cir. 1985). It is not sufficient to merely mention it only in a trial brief if it was not actually tried to the district court. See State Farm Mut. Auto Ins. Co. v. Mid-Continent Cas. Co., 518 F.2d 292, 296 (10th Cir. 1975).

By every standard, the assertion of the preclusion defense was waived by respondent. The Ninth Circuit, in permitting respondent to assert the claim preclusion defense on appeal, merely noted that respondent could not have done so in its 1980 answer, that admittedly "considerable time" did pass between the award in 1981 and first mentioning it in any filing with the district court, and that raising it in its "Trial Brief re Allowable Damages" just before the damages trial in October 1985 was sufficient to preserve the issue. The Ninth Circuit reached this conclusion even though:

(a) It was never presented in any motion or other device affording the district court the opportunity to rule upon it prior to post-trial motions, despite the passage of four (4) years within which to do so;

(b) Respondent failed to include the matter in any of the pretrial pleadings, including two (2) pretrial orders, all of which were filed long after the WCAB judgment was final;

(c) Respondent elected, by stipulation with petitioner, to have the sum received in the WCAB proceeding setoff against the lost income awarded by the jury, which award has been affirmed by the Ninth Circuit;

(d) Respondent did not preserve its right to file a Motion for Judgment Notwithstanding the Verdict on preclusion grounds by making a motion for directed verdict.

After having obtained that setoff, respondent then attempted to assert the preclusion defense in post-trial motions without any semblance of explanation or excuse for having failed to do so earlier. At no time did respondent move to amend the Pretrial Conference Orders.

By ignoring this record, and holding that such an affirmative defense an be raised and preserved in such tardy fashion, the Ninth Circuit has placed itself at odds with several other circuits who have held that this defense is waived if not raised earlier and more concretely before trial[23]. The Fifth Circuit has held that when it arises after commencement of the subsequent litigation, it must be asserted with some degree of diligence. See Home Depot, Inc., supra, 773 F.2d at 620-21 n.4. And the Tenth Circuit expressly rejected the very same contention advanced by respondent herein, holding that merely raising it in a trial brief, without actually litigating it at trial, does not preserve the defense. See State Farm Mut. Auto Ins. Co., supra, 518 F.2d at 296.

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[23]. The panel's ruling appears to even be at odds with authority in its own circuit. See United States v. First Nat. Bank of Circle, 652 F.2d 882, 886-87 (9th Cir. 1981) (particular theories not at least implicitly in order are barred unless

A party has no right to raise an issue or defense not properly preserved in a Pretrial Order unless and until a motion to amend the order is made and granted. See

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order first modified to prevent manifest injustice); Wood v. Sunn, 865 F.2d 982, 987 (9th Cir. 1988) (even affirmative defense raised in Answer is not preserved if never presented to district court for ruling); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1459 (9th Cir. 1988) (motion for j.n.o.v. not considered if no motion for directed verdict on same grounds).

First Nat. Bank of Circle, supra, 652 F.2d at 887. The whole pretrial process is meaningless if a party defendant can omit an affirmative defense in its pretrial memoranda or in two different lengthy and time-consuming pretrial orders, the second order having been issued to redress that very party's previous omissions as to their affirmative defenses; then slip it into a trial brief over plaintiff's objections, while failing to bring any motion procedurally or on the merits to the district court's attention on that issue; then fail to make a proper directed verdict motion; then permit the merits to be tried in fact, while seeking and obtaining the plaintiff's and the court's agreement to permit a setoff from the prior litigation; and then belatedly and improperly assert it as an improper Motion for Judgment Notwithstanding the Verdict.

Petitioner respectfully urges this Court to grant this petition for a writ of certiorari on this issue, to establish a uniform rule as to when a party must make a timely assertion of the claim or issue preclusion defense. The rule in the Ninth Circuit now permits it to be raised at virtually any time, even after the trial court and other party has been obliged to bear the burden and expense of trial. This is especially unjust if the party asserting the defense did not assert it earlier in order to first obtain a setoff from the earlier adjudication, in effect tricking petitioner into agreeing to that in the belief that the preclusion defense was not being pursued.

This broad and loose rule is at odds with other circuits, and this Court is respectfully urged to resolve that disagreement and establish a uniform rule.

III.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI ON WHETHER PETITIONER IS ENTITLED TO SOME AWARD OF ATTORNEYS' FEES AND COSTS ON APPEAL IN DEFENSE OF HIS VERDICT BELOW WHERE PETITIONER HAS AN ABSOLUTE RIGHT TO AT LEAST SOME ATTORNEYS' FEES IN THE DISTRICT COURT

Petitioner seeks a writ of certiorari on this issue based on Rule 10(c). This Court has ruled that a plaintiff who prevails by obtaining a verdict on a significant part of his case is entitled to at least some apportionment of attorneys' fees. The question presented is whether that rule applies with equal force to attorneys' fees incurred in the successful defense of a significant part of that verdict in the Court of Appeal.

The Ninth Circuit denied petitioner fees and costs on this appeal, although a half of the judgment was successfully defended on appeal. The Court gave no explanation for this ruling. Presumably, the Ninth Circuit initially relied on its newly fashioned and unprecedented rule, declared in the companion opinion, that a prevailing plaintiff in a civil rights action can be denied attorney's fees and costs if he "came out of the case with adequate funds to pay his fees and costs."

The Ninth Circuit later reversed itself, citing Texas State Teachers Ass'n v. Garland Independent School Dist., 103 L.Ed.2d 866 (1989) [Appendix G] in which the Supreme Court held that when a plaintiff has any success greater than "purely technical or de minimis" the plaintiff is entitled to some fee award fairly representing the success achieved in light of the overall objectives of the suit[24]. Id., 103 L.Ed.2d at 876-78. This

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[24]. "Hensley does indicate that the degree of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination

Court expressly has noted that the statutory purpose is to compensate for the plaintiff having successfully served in the "private attorney general" role. Id., 103 L.Ed.2d at 878.

Indeed, this Court stated that Congress had expressly indicated an intent that a plaintiff such as petitioner is "entitled" to some [interim] fee award"[25]. This Court has never indicated, in any of

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of the size of a reasonable fee, not to eligibility for a fee award at all. . . . If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind. . . . [T]he degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non." Id., 103 L.Ed.2d at 876-78.

[25]. "If petitioner's victory . . . had been only an interim one, with other issues remanded for further proceedings in the district court, petitioners would have been entitled to some fee award for their successful claims . . . ." Id., at 876.

its pronouncements on attorneys fees, that any distinction is to be made based on attorneys fees and costs incurred in appellate and trial courts.

Petitioner therefor should entitled to attorneys' fees on appeal on the same criteria and standards as they are available in the district court. The policy considerations and legislative history supporting the Garland decision apply with equal force to attorneys' fees incurred in the appellate courts.

This conclusion is especially true where the plaintiff has either successfully defended the entire verdict; or, where, as herein, there was a substantial degree of success, and the sole issue on which petitioner did not prevail was based on an affirmative defense which the Court of Appeal permitted defendants to first assert in post-trial motions in a departure from all applicable pleading and pretrial rules and procedures.

The rule applied by the Ninth Circuit essentially penalizes successful plaintiffs and their attorneys, by requiring them to defend their judgments without compensation for further attorneys' fees and costs incurred on appeal. Conversely, it rewards defendants for unsuccessful appeals by providing a cost-free delay in payment of plaintiffs' judgments, with the attendant attrition factor which serves to discourage other plaintiffs and attorneys with legitimate claims.

Petitioner therefore respectfully urges this Court that it should issue a writ of certiorari to determine this important issue. This application of the rules governing attorneys' fees by the Ninth Circuit, permitting it to simply deny without explanation both attorneys' fees and costs on appeal to a prevailing plaintiff, appears to be at odds with the Garland decision and its numerous antecedents, as well as the underlying policy purposes of 42 U.S.C. sec.1988.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the Ninth Circuit Court of Appeal, and review the issues raised herein.

Date: May 23, 1991 Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant-Appellant,
and
CITY OF SANTA ANA POLICE DEPARTMENT; DON BOTTS; RAYMOND C. DAVIS; E. B. HANSEN; ROBERT STEBBENS; NORWOOD WILLIAMS; LEE DRUMMOND; LAWRENCE PITZER; MICHAEL LLEWELLYN; DALE STERZER; GARY DIXON; JOHN COLLINS; JOHN McDANIELS; MICHAEL LANNERS; WILLIAM BRUNS; JOHN DITTUS; RICHARD FAUST; JOHN McCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

JESSE J. SANCHEZ; VICTOR TORRES; ROBERT CARO, *Plaintiffs-Appellees,* v. CITY OF SANTA ANA, *Defendant,* and NORWOOD WILLIAMS; LEE DRUMMOND; LAWRENCE PITZER; MICHAEL LLEWELLYN; DALE STERZER; GARY DIXON; JOHN COLLINS; JOHN McDANIELS; MICHAEL LANNERS; WILLIAM BRUNS; JOHN DITTUS; RICHARD FAUST; JOHN McCLAIN, *Defendants-Appellants.*	No. 88-5287 OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

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*Judge Irving Hill, District Judge for the Central District of California, presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part and vacating in part the district court's grant of summary judgment, the court of appeals held that the City of Santa Ana violated a police officer's due process rights by removing his merit pay and refusing to give him a post-removal hearing.

Appellant the City of Santa Ana appealed the district court's summary judgment in favor of appellant former city police officer Jesse Sanchez on his 42 U.S.C. § 1983 claim that the City violated his due process rights in removing his merit pay. The City also appealed the jury's damage award of $400,000 in lost wages and $500,000 for emotional distress.

[1] The City argued that Sanchez had no property interest in his merit pay. In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. **[2]** Sanchez correctly asserted that prior to its amendment in June 1978, Santa Ana Charter Section 1008, the grievance procedure in effect at the time Sanchez began receiving merit pay, created a constitutionally protected property interest in merit pay. **[3]** A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. However, old Section 1008 did more than create an entitlement to an administrative appeal where a city employee's merit pay was removed. Old Section 1008 treated a reduction in pay as a demotion, and by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City's authority to demote an employee to the specified reasons. **[4]** The

City argued that Sanchez did not have a property interest in his merit pay at the time it was taken away because the removal of merit pay had been excluded from Section 1008's grievance procedure pursuant to the June 1978 amendment. This amendment, however, took effect after Sanchez had progressed to merit step E. Sanchez thus had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008. The City could not arbitrarily take away this right simply by amending Section 1008. Sanchez had a constitutionally protected property interest in his merit pay prior to the amendment of Section 1008.

[5] The City also contended that even if Sanchez had a property interest in his merit pay, the procedure the City followed in removing his merit pay satisfied due process. **[6]** Sanchez did not contend that he should have been given a pre-removal hearing. He was entitled to an administrative appeal or post-removal hearing to challenge the final decision to eliminate his merit pay. He received no hearing or opportunity to be heard at any time. **[7]** His property interest was taken without due process.

[8] The City contended that Sanchez waived his right to challenge the grievance procedure on the ground that he did not follow even the first step in the grievance procedure. **[9]** The facts do not support this contention. In accordance with Section 1008, Sanchez attempted to invoke the grievance procedure by requesting a written statement of the charges against him in his memorandum to Chief Davis, to which Chief Davis never responded. His subsequent memos to Captain Hansen and Lieutenant Jordan sought to clarify the grievance after Chief Davis failed to respond to Sanchez's initial memorandum invoking the grievance procedure. Sanchez did not waive his right to challenge the procedure.

[10] The court affirmed the damage award for lost income, but vacated the award for emotional distress. **[11]** The City contended that Sanchez's claim in federal court for emotional distress was barred under res judicata principles by his workers' compensation award. On this point, the City prevailed.

COUNSEL

Charles Matheis, Jr., Santa Ana, California, for the defendants-appellants.

Meir J. Westreich, Glendale, California, for the plaintiffs-appellees.

OPINION

GOODWIN, Chief Judge:

The City of Santa Ana appeals the district court's summary judgment in favor of former city police officer Jesse J. Sanchez on his claim under 42 U.S.C. § 1983 that the City violated his due process rights in removing his merit pay. The City also appeals the jury's damage award of $400,000 in lost wages and $500,000 for emotional distress.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm the summary judgment and affirm in part and vacate in part the damage award.

The City of Santa Ana Police Department hired Sanchez in late 1975 pursuant to a program to recruit Spanish-speaking officers. His salary was initially set at step C, the base salary for police officers hired from other police departments as lateral transfers. By April 1, 1978, Sanchez had progressed to merit step E, the highest salary step, which is awarded on the basis of meritorious performance.

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[1] This opinion addresses the City's appeal from the summary judgment and damage award in favor of Sanchez. The appeal of Sanchez and the other two former police officers involved in this suit is addressed in *Sanchez v. City of Santa Ana*, Nos. 85-6504, 86-6226, 87-5614, 88-5853, slip op. — (9th Cir. 1990).

In February 1979, defendant Sergeant Collins, Sanchez's supervisor, prepared an annual performance review recommending that Sanchez's merit step E be removed because he was performing "below job standards." Excerpts of Record [ER] at 701-703. No action was taken at that time.

On March 14, 1979, defendant Captain Hansen submitted a memorandum to Chief of Police Davis recommending that Sanchez's merit step D be removed because of two disciplinary suspension recommendations from Sanchez's supervisors, Sergeant Collins and Lieutenant Williams. At the conclusion of the recommendation, Captain Hansen wrote: "This action should not be considered disciplinary. It is intended as an action based on substandard job performance." ER at 910-11.

On March 15, 1979, Sanchez left work during roll call, claiming emotional illness. Later that same day, his merit step E was formally removed, retroactive to March 1, 1979.

On March 26, 1979, Chief Davis approved in writing the removal of Sanchez's merit step D, effective April 1, 1979.

In a March 30, 1979 memorandum to Chief Davis, Sanchez indicated that he wished to contest the removal of his merit pay, and requested a written statement of the charges against him. Captain Hansen responded to Sanchez's memorandum, stating that the removal of his merit pay was not based on any specific charges against him other than a failure to perform at a level justifying merit pay. He further advised Sanchez that he could challenge the removal by arranging for an interview with Chief Davis or by relying on his written memorandum. It is undisputed that Chief Davis never responded to Sanchez's memorandum.

In an April 13, 1979 memorandum to Captain Hansen, Sanchez reiterated his request for a statement of the charges upon which the removal of his merit pay was based, because without such a statement he did "not know how to respond to the pay reductions in the grievance procedure." ER at 927. Captain Hansen again informed Sanchez that the removal of his merit pay was based solely upon his substandard performance, that he should submit a written grievance to, or request an interview with, Chief Davis, and that he could obtain further clarification of the grievance procedure from Lieutenant Jordan.

In an April 25, 1979 memorandum to Lieutenant Jordan, Sanchez requested an explanation of the procedure the department had followed in removing merit pay and of the grievance procedure to challenge its removal. He indicated that he wished to pursue the grievance procedure, but first wanted to understand the complete procedure. Lieutenant Jordan informed him that Santa Ana City Council Resolution 58-281 covered the procedure the department had used in removing Sanchez's merit pay and that Section 10.77 of the Santa Ana Police Department's Rules and Regulations covered the grievance procedure to challenge its removal. Resolution 58-281 provides that an officer's merit pay may be removed upon the recommendation of the head of the police department and the approval of the City Manager. Section 10.77 permits an employee to present grievances concerning adverse personnel action through channels up to and including the Chief of Police. Lieutenant Jordan's letter made no reference to the City's grievance procedure, Santa Ana City Charter Section 1008, which grants the right to a hearing before the Santa Ana Personnel Board.

Beginning on May 6, 1989, Sanchez took a four-month medical leave of absence. By letter dated September 6, 1979, Sanchez advised the City that his doctor had conditionally released him to return to work. He requested information concerning his new work assignment, which the City provided the same day.

By letter dated September 10, 1979, Sanchez alleged that the removal of his merit pay was a demotion and a continuing pattern of discrimination which had caused him to suffer a stress reaction. He indicated that he would return to work only if his merit pay were restored.

Lieutenant Jordan phoned Sanchez on behalf of the City and denied his request for immediate restoration of his merit pay. Sanchez thereafter submitted a letter of resignation effective September 10, 1979.

Sanchez and two other former police officers filed in federal district court a complaint for damages and injunctive relief against the City, Chief Davis, and other named members of the department. The complaint alleged that the City had removed Sanchez's merit pay without due process of law, that Sanchez had been constructively discharged from his job, and that, as a result of emotional distress, he suffered from a work-related disability.

On February 7, 1983, the defendants filed a motion in limine, seeking in part a declaration that Santa Ana City Charter Section 1008, as amended, (the City's grievance procedure) was constitutional. Prior to its amendment in June 1978, Section 1008 granted to City employees whose pay had been reduced the right to a written statement of the charges leading to the pay reduction and the right to a hearing before the Santa Ana Personnel Board. The June 1978 amendment removed merit pay reductions from the coverage of Section 1008.

Sanchez responded by moving for summary judgment. He argued that the amended Section 1008 could not be applied retroactively to him because he had begun receiving merit pay prior to the effective date of the amendment, and that he had a property interest in his merit pay which could not be taken away without due process.

On June 3, 1983, the district court granted partial summary judgment in favor of Sanchez and against the City and Chief Davis on Sanchez's due process claim. The court concluded that the City had denied Sanchez due process in removing his merit pay, and that the denial of due process was a proper claim under 42 U.S.C. § 1983. The court subsequently exonerated Chief Davis of personal liability and reserved for trial the issue of the scope, nature and amount of damages against the City.

Following a trial on the issue of damages, the jury determined that the due process violation constituted a constructive discharge, and awarded Sanchez $400,000 in lost income and $500,000 for emotional distress. After the City's post-trial motions were denied, the City brought this appeal.

I. *The Summary Judgment In Favor of Sanchez*

The City advances four assignments of error: (a) Sanchez did not have a constitutionally protected property interest in his merit pay; (b) the grievance procedure available to Sanchez satisfied due process; (c) Sanchez waived his right to challenge the grievance procedure; and (d) Sanchez's due process claim is barred by *Parratt v. Taylor,* 451 U.S. 527 (1981). We reject these contentions.

(a) *Property interest in merit pay*

[1] The City argues that Sanchez had no property interest in his merit pay. "The ... due process guarantees of the fourteenth amendment apply only when a constitutionally protected liberty or property interest is at stake." *Sorrano's Gasco, Inc. v. Morgan,* 874 F.2d 1310, 1316 (9th Cir. 1989). Property interests are not created by the Constitution; instead, "they are created and their dimensions are defined by

existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. *Id.*

[2] Sanchez correctly asserts that prior to its amendment in June 1978, Santa Ana City Charter Section 1008 (hereinafter "old Section 1008"), the grievance procedure in effect at the time Sanchez began receiving merit pay, created a constitutionally protected property interest in merit pay.

[3] A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. *See McGraw v. Huntington Beach,* 882 F.2d 384, 389 (9th Cir. 1989) (property cannot be defined by the procedures for its deprivation). But old Section 1008 did more than create an entitlement to an administrative appeal where a city employee's merit pay is removed. Old Section 1008 treated a reduction in pay as a demotion, and, by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City's authority to demote an employee to the specified reasons.[2] *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538-39 (1985) (classified civil service employee had property interest in continued employment because a state statute provided that such

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[2] Old Section 1008 provided in relevant part:

"Each or any of these actions relating to suspension, demotion, or dismissal may be taken by the officer having power of appointment to the position on the grounds of incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or City rules or the rules and regulations as provided in this Article, or failure to cooperate reasonably with his superiors or fellow employees. . . .

A reduction in pay shall be treated as a demotion under this Section. . . ."

employees may not be dismissed except for certain specified reasons); *cf. Hogue v. Clinton,* 791 F.2d 1318, 1324 (8th Cir.) (discharged employee had no property interest in employment where grievance procedure merely provided an avenue to appeal the discharge and did not guide or restrict the employer's decision to terminate), *cert. denied,* 479 U.S. 1008 (1986).

[4] The City argues that Sanchez did not have a property interest in his merit pay at the time it was taken away because the removal of merit pay had been excluded from Section 1008's grievance procedure pursuant to the June 1978 amendment. This amendment, however, took effect *after* Sanchez had progressed to merit step E. As the City acknowledged at oral argument, under old Section 1008, once Sanchez began receiving merit pay, it would have continued automatically absent affirmative action on the part of the City to take it away. Sanchez thus had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008. The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending Section 1008. *See Olson v. Cory,* 27 Cal.3d 532, 609 P.2d 991, 164 Cal.Rptr. 217 (1980) (declaring unconstitutional the state's attempt to limit certain cost-of-living increases in judges' salaries by amending a state compensation system; the state was required to pay judges entering office prior to the amendment at the then-mandated salary level). The cases teach that Sanchez had a constitutionally protected property interest in his merit pay prior to the amendment of Section 1008.[3]

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[3] The City's reliance on *Veit v. Heckler,* 746 F.2d 508 (9th Cir. 1984), is misplaced. In *Veit,* we held that a federal civil service employee did not have a property interest in receiving a merit pay increase. *Id.* at 511. Here, in contrast, Sanchez had been receiving merit pay for nearly one year and, short of affirmative action on the City's part, would have continued to receive it.

(b) *Adequacy of the City's procedure*

[5] The City next contends that, even if Sanchez had a property interest in his merit pay, the procedure the City followed in removing his merit pay satisfied federal due process. The district court correctly held that the procedures the City followed did not satisfy due process.

"Whether deprivation of a property right implicates a due process right to a hearing is a matter of federal constitutional law." *Ostlund v. Bobb,* 825 F.2d 1371, 1373 (9th Cir. 1987), *cert. denied,* 486 U.S. 1033 (1988). Due process generally requires " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' "[4] *Loudermill,* 470 U.S. at 542 (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)) (emphasis in original).

[6] Sanchez does not contend, nor must he contend, that he should have been given a pre-removal hearing. He was entitled to an administrative appeal, or a post-removal hearing, to challenge the final decision to eliminate his merit pay. He received no hearing or an opportunity to be heard at any time.

It is undisputed that Sanchez was entitled to an administrative appeal under California law. Section 3304(b) of the state Bill of Rights Act provides that no punitive action may be taken against a police officer without providing the officer with an opportunity for an administrative appeal. *Baggett v. Gates,* 32 Cal.3d 128, 141, 649 P.2d 874, 881, 185 Cal.Rptr. 232, 239 (1982). Section 3303 defines "punitive action" to include a reduction in salary. *Id.*

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[4] Two well-established exceptions exist: (1) where the property deprivation is the result of random and unauthorized conduct by a state employee such that meaningful predeprivation process is not possible; or (2) where protection of the public interest requires an immediate seizure of property without a hearing. *See Sorrano's Gasco,* 874 F.2d at 1317-18.

[7] Because Sanchez was never given an opportunity for a hearing of any kind to contest the removal of his merit pay,[5] his property interest was taken without due process.

(c) *Waiver*

[8] The City next argues that Sanchez waived his right to challenge the grievance procedure on the ground that Sanchez never submitted a written memorandum to or made an appointment with Chief Davis, despite Captain Hansen's written instructions that this was the first step in the grievance procedure. The City further argues that Sanchez's March 30, 1979 memorandum to Chief Davis and April 25, 1979 memorandum to Lieutenant Jordan merely evidence an attempt to obtain information prior to instituting the grievance procedure, not an attempt to institute the grievance procedure. This argument also fails to excuse the denial of any kind of procedural review.

"A waiver of a constitutional right is 'not to be implied and is not lightly to be found.' " *Ostlund,* 825 F.2d at 1373 (quoting *United States v. Provencio,* 554 F.2d 361, 363 (9th Cir. 1977)). It must be knowing and voluntary. *Id.*

[9] The facts do not support the City's contention that Sanchez waived his right to a hearing. City Charter Section 1008, the City's grievance procedure, provides that a City employee who has suffered a pay reduction is entitled to a written statement of the charges leading to the pay reduction. In accordance with Section 1008, Sanchez attempted to invoke the grievance procedure by requesting a written statement of the charges against him in his March 31, 1979 memorandum to Chief Davis, to which Chief Davis never responded. Not surprisingly, his subsequent memos to Captain Hansen and

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[5] Because Sanchez does not contend that he was entitled to a hearing prior to the removal of his merit pay, we do not reach the abstract issue of whether Sanchez was entitled to a pre-removal hearing.

Lieutenant Jordan sought to clarify the grievance procedure after Chief Davis failed to respond to Sanchez's initial memorandum invoking the grievance procedure. Sanchez has not waived his right to challenge the procedure.

(d) *Parratt v. Taylor*

We also reject the City's argument that *Parratt v. Taylor*, 451 U.S. 527 (1981), bars Sanchez's due process claim. Because Sanchez sought only a post-deprivation hearing and it was denied, *Parratt*, which addresses when pre-removal hearings are required, is plainly inapplicable.

The City argues for the first time in its reply brief that Sanchez's § 1983 claim against the City must fail because Sanchez did not establish that the City's policy makers acted to deprive him of due process. As a general rule, an appellant may not raise an argument for the first time in a reply brief. *See Northwood Acceptance Corp. v. Lynnwood Equipment*, 841 F.2d 918, 924 (9th Cir. 1988). The City offers no justification for departure from this rule, and we therefore decline to address its argument.

II. *The Damage Award*

[10] The City challenges the jury's verdict granting Sanchez $400,000 in lost income and $500,000 for emotional distress on the following grounds: (a) the City's single act of removing Sanchez's merit pay cannot a constitute constructive discharge as a matter of law; (b) damages for emotional distress were barred by Sanchez's state workers' compensation award; and (c) it was prejudicial error for the district court to refuse to instruct the jury that a directed verdict had been entered in the City's favor on all of Sanchez's other claims. We affirm the damage award for lost income but vacate the award for emotional distress.

(a) *Constructive discharge*

The City contends that the removal of Sanchez's merit pay, standing alone, is insufficient as a matter of law to support a finding of constructive discharge because a single, isolated incident of employment discrimination is insufficient to establish constructive discharge. We reject this contention.

An employee who resigns, as Sanchez did, cannot secure backpay unless his employer constructively discharged him. *Satterwhite v. Smith,* 744 F.2d 1380, 1381 n.1 (9th Cir. 1984). "A constructive discharge occurs when, looking at the totality of the circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.' " *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)(quoting *Satterwhite,* 744 F.2d at 1381).

Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. *Thomas v. Douglas,* 877 F.2d 1428, 1434 (9th Cir. 1989). In general, however, a single isolated incident is insufficient as a matter of law to support a finding of constructive discharge. *Watson,* 823 F.2d at 361. Thus, a plaintiff alleging a constructive discharge must show some " 'aggravating factors,' such as a 'continuous pattern of discriminatory treatment.' " *Satterwhite,* 744 F.2d at 1382 (quoting *Clark v. Marsh,* 665 F.2d 1168, 1174 (D.C. Cir. 1981)).

The removal of Sanchez's merit pay coupled with the attending aggravating factors in the record permitted a trier of fact to conclude that a reasonable person would have felt compelled to quit. The removal of Sanchez's merit pay is more properly viewed as two discrete incidents. Sanchez lost his merit step E pursuant to a negative evaluation prepared by Sergeant Collins, Sanchez's immediate supervisor. He lost his merit pay step D pursuant to Captain Hansen's recommendation to Chief Davis.

Moreover, significant aggravating factors were present. Sanchez lost his merit pay step E on the same day that he left work suffering from a stress reaction. His merit pay step D was removed while he was on an approved medical leave of absence. Most significantly, Sanchez's repeated attempts to invoke the grievance procedure were rebuffed.

(b) *The state worker's compensation award*

[11] The City contends that Sanchez's claim in federal court for emotional distress is barred under res judicata principles by his state workers' compensation award. On this point the City prevails.

Sanchez had previously filed two claims with the California Workers' Compensation Appeals Board for emotional injuries arising out of the loss of his merit pay. Pursuant to the parties' stipulation, the appeals board found that Sanchez's stress-related injuries caused a permanent disability of 30½% and awarded him $8,662.50 for the period between the City's removal of Sanchez's merit pay in March 1979 and Sanchez's medical leave of absence in May 1979. The appeals board further determined that it lacked the authority to award pay during Sanchez's leave of absence and that his resignation on September 10, 1979 precluded his claim for entitlement to further benefits.

Preliminarily, we reject Sanchez's contention that the City has waived its right to assert res judicata. Res judicata is an affirmative defense and is ordinarily waived if not specially pleaded. Fed. R. Civ. P. 8(c); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984). "[A] preclusion defense that arises after the pleadings have been filed can be raised only by a motion for leave to file a supplemental answer under [Federal Rule of Civil Procedure] 15(d)." *Id.* We liberally construe such attempts to raise the defense as motions for leave to file a supplemental answer. *Id.*

The City could not have raised a preclusion defense in its August 14, 1980 answer because Sanchez did not receive the compensation award until November 12, 1981. The City raised the issue in its "Brief re. Allowable Damages" in October 1985. While considerable time had passed since the date of the award, the City did raise the issue prior to the trial on damages, thus giving Sanchez " 'notice of the plea of estoppel and a chance to argue . . . why the imposition of an estoppel would be inappropriate.' " *Id.* (quoting *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 350 (1971)). We therefore hold that the City has not waived its right to assert preclusion of that claim.

Whether Sanchez's compensation award for emotional injuries bars under res judicata principles his section 1983 claim for damages for emotional distress is answered by state law. *See Eilrich v. Remas,* 839 F.2d 630, 632 (9th Cir.), *cert. denied,* _ U.S. _, 109 S. Ct. 60 (1988).

California law provides that if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided thereunder constitute the exclusive remedy against the employer. *See* Cal. Labor Code § 3601; *Hollywood Refrigeration Sales Co., Inc. v. Superior Court,* 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). Work-related emotional injuries are fully compensable under the Workers' Compensation Act, *Giorgi v. Verdugo Hills Hospital,* 210 Cal. App. 3d 252, 272 (1989). Indeed, Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award of $500,000 for emotional distress.[6]

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[6] The City also contends that there was insufficient evidence to establish that the jury's award of damages for emotional distress stemmed from the due process violation. Because we vacate the award of damages for emotional distress on other grounds, it is unnecessary to address this contention.

(c) *Directed verdict*

The City contends that the district court erred by not instructing the jury that a directed verdict had been entered in the City's favor on all of Sanchez's claims except for the due process violation. This error was prejudicial, the City argues, because by failing to indicate that a directed verdict had been entered in the City's favor, the district court implicitly "gave the impression that it was finding against the City regarding the claims alleged over the 39 days [of trial]." Appellee's Brief at 18. We find no error.

The district court has wide latitude in tailoring jury instructions. *Thorsted v. Kelly,* 858 F.2d 571, 573 (9th Cir. 1988). We view jury instructions as a whole, and examine them to determine whether they "fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Id.* An error in instructing the jury does not require reversal if it is more probably than not harmless. *Course v. A.H. Robins Co. Inc.,* 764 F.2d 1329, 1337 (9th Cir.), *modified,* 773 F.2d 1049 (9th Cir. 1985).

The district court had no duty to inform the jury that a directed verdict had been entered in the City's favor on counts that were not being submitted. The only issue before the jury was the scope, nature, and amount of damages on Sanchez's § 1983 due process claim; liability had already been fixed by the district court's earlier partial summary judgment order. The district court permitted Sanchez's counsel to read the order granting partial summary judgment, thus focusing the jury's attention on the issue of damages on the due process claim. Considering the jury instructions as a whole, we conclude that the district court did not commit prejudicial error in failing to inform the jury that a directed verdict had been entered on claims not properly before the jury.[7]

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[7] The City similarly argues that the district court gave the impression that the plaintiffs' claims had survived by allowing Caro and Torres, Sanchez's

We therefore affirm the summary judgment on Sanchez's due process claim. We affirm the jury's damage award for lost income. We vacate the damage award for emotional distress. Neither party is entitled to costs or attorney fees on appeal.

AFFIRMED IN PART; VACATED IN PART.

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co-plaintiffs on other discrimination claims, to sit at the counsel table with Sanchez. The district court, however, clearly informed the jury that the only issue before it was the damages stemming from the procedural due process violation.

APPENDIX B

REPRINTED WITH CORRECTIONS JULY 30, 1990

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,
Defendant-Appellant,

and

CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
McDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN McCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant,
and
NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LLEWELLYN; DALE
STERZER; GARY DIXON; JOHN
COLLINS; JOHN MCDANIELS;
MICHAEL LANNERS; WILLIAM BRUNS;
JOHN DITTUS; RICHARD FAUST;
JOHN MCCLAIN,
Defendants-Appellants.

No. 88-5827
ORDER

Filed July 16, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

ORDER

The opinion filed in this case on July 11, 1990 is WITHDRAWN.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant-Appellant,
and
CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
MCDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN MCCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

Filed July 20, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and
Diarmuid F. O'Scannlain,
Circuit Judges.

ORDER

By August 3, 1990, the parties shall file supplemental briefs, not exceeding 20 pages, on the effect of the California Supreme Court's depublication of Giorgi v. Verdugo Hills Hospital, 210 Cal.App.3d 252 (1989).

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant-Appellant,
and
CITY OF SANTA ANA POLICE DEPARTMENT; DON BOTTS; RAYMOND C. DAVIS; E. B. HANSEN; ROBERT STEBBENS; NORWOOD WILLIAMS; LEE DRUMMOND; LAWRENCE PITZER; MICHAEL LLEWELLYN; DALE STERZER; GARY DIXON; JOHN COLLINS; JOHN McDANIELS; MICHAEL LANNERS; WILLIAM BRUNS; JOHN DITTUS; RICHARD FAUST; JOHN McCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant,
and
ROBERT STEBBENS; NORWOOD WILLIAMS; LEE DRUMMOND; LAWRENCE PITZER; MICHAEL LLEWELLYN; DALE STERZER; GARY DIXON; JOHN COLLINS; JOHN McDANIELS; MICHAEL LANNERS; WILLIAM BRUNS; JOHN DITTUS; RICHARD FAUST; JOHN McCLAIN,
Defendants-Appellants.

No. 88-5827

OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Opinion Filed July 11, 1990
Opinion Withdrawn July 16, 1990

Filed September 25, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

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*Judge Irving Hill, District Judge for the Central District of California, presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law/Damages

Affirming in part and vacating in part a district court judgment, the court of appeals held that a city's failure to provide an administrative appeal, or post-removal hearing, to a former police officer to challenge a final decision to eliminate his merit pay violated the officer's due process rights.

Jesse J. Sanchez was hired by appellant City of Santa Ana Police Department under a program for recruiting Spanish-speaking officers. Although at first Sanchez received several merit pay increases for meritorious performance, later his merit step increases were removed for allegedly performing "below job standards." One of his merit steps was removed while he left work claiming emotional illness. The Chief of Police approved the removal of Sanchez's merit steps, and did not respond to Sanchez's written requests about information concerning the grievance procedure. Sanchez was never informed of the City's grievance procedure, which granted the right to a hearing before the Santa Ana Personnel Board. However, in 1978, an amendment to the City Charter removed merit pay reductions from its grievance procedure coverage. After a four-month approved medical leave of absence, followed by the City's refusal to restore his merit pay, Sanchez resigned. The district court granted summary judgment for Sanchez on his due process claim. Following a trial on the issue of damages, a jury determined that the due process violation was a constructive discharge and awarded Sanchez monetary damages for lost income and emotional distress.

[1] The court agreed with Sanchez's claim that the grievance procedure in effect at the time Sanchez began receiving

merit pay created a constitutionally protected property interest in merit pay. [2] Thus, the old Charter provision created an entitlement to an administrative appeal when a city employee's merit pay was removed. [3] The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending that section. [4] Because under California law Sanchez was entitled to an administrative appeal in which to challenge the final decision to eliminate his merit pay, failure by the City to provide a hearing of any kind to contest this removal resulted in a taking of Sanchez's property interest without due process. [5] The facts did not support the City's position that Sanchez waived his right to a hearing. Sanchez's invocation of the applicable grievance procedure went unanswered by the Police Chief and Sanchez's supervisors. [6] The removal of Sanchez's merit pay, coupled with the attending aggravating factors of intolerable and discriminatory working conditions, permitted the trier of fact to find constructive discharge by concluding that a reasonable person would have felt compelled to quit. [7] However, the City was correct that Sanchez's federal claim for emotional distress was barred under res judicata principles by his state workers' compensation award. [8] Under California law, if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided constitute the exclusive remedy against the employer. Because Sanchez recovered damages for his emotional injuries under the Act, the court vacated the jury's damage award for emotional distress. [9] The district court did not commit prejudicial error in failing to inform the jury that a directed verdict was entered on Sanchez's due process claim. The only issue before the jury was the scope, nature, and amount of damages on Sanchez's claim.

COUNSEL

Charles Matheis, Jr., Beam & Brobeck, Santa Ana, California, for the defendants-appellants.

Meir J. Westreich, Glendale, California, for the plaintiffs-appellees.

OPINION

GOODWIN, Chief Judge:

The City of Santa Ana appeals the district court's summary judgment in favor of former city police officer Jesse J. Sanchez on his claim under 42 U.S.C. § 1983 that the City violated his due process rights in removing his merit pay. The City also appeals the jury's damage award of $400,000 in lost wages and $500,000 for emotional distress.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm the summary judgment and affirm in part and vacate in part the damage award.

The City of Santa Ana Police Department hired Sanchez in late 1975 pursuant to a program to recruit Spanish-speaking officers. His salary was initially set at step C, the base salary for police officers hired from other police departments as lateral transfers. By April 1, 1978, Sanchez had progressed to merit step E, the highest salary step, which is awarded on the basis of meritorious performance.

In February 1979, defendant Sergeant Collins, Sanchez's supervisor, prepared an annual performance review recommending that Sanchez's merit step E be removed because he was performing "below job standards." Excerpts of Record [ER] at 701-703. No action was taken at that time.

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[1] This opinion addresses the City's appeal from the summary judgment and damage award in favor of Sanchez. The appeal of Sanchez and the other two former police officers involved in this suit is addressed in *Sanchez v. City of Santa Ana*, Nos. 85-6504, 86-6226, 87-5614, 88-5853, slip op. 7001 (9th Cir. July 11, 1990).

On March 14, 1979, defendant Captain Hansen submitted a memorandum to Chief of Police Davis recommending that Sanchez's merit step D be removed because of two disciplinary suspension recommendations from Sanchez's supervisors, Sergeant Collins and Lieutenant Williams. At the conclusion of the recommendation, Captain Hansen wrote: "This action should not be considered disciplinary. It is intended as an action based on substandard job performance." ER at 910-11.

On March 15, 1979, Sanchez left work during roll call, claiming emotional illness. Later that same day, his merit step E was formally removed, retroactive to March 1, 1979.

On March 26, 1979, Chief Davis approved in writing the removal of Sanchez's merit step D, effective April 1, 1979.

In a March 30, 1979 memorandum to Chief Davis, Sanchez indicated that he wished to contest the removal of his merit pay, and requested a written statement of the charges against him. Captain Hansen responded to Sanchez's memorandum, stating that the removal of his merit pay was not based on any specific charges against him other than a failure to perform at a level justifying merit pay. He further advised Sanchez that he could challenge the removal by arranging for an interview with Chief Davis or by relying on his written memorandum. It is undisputed that Chief Davis never responded to Sanchez's memorandum.

In an April 13, 1979 memorandum to Captain Hansen, Sanchez reiterated his request for a statement of the charges upon which the removal of his merit pay was based, because without such a statement he did "not know how to respond to the pay reductions in the grievance procedure." ER at 927. Captain Hansen again informed Sanchez that the removal of his merit pay was based solely upon his substandard performance, that he should submit a written grievance to, or request an interview with, Chief Davis, and that he could obtain further clarification of the grievance procedure from Lieutenant Jordan.

In an April 25, 1979 memorandum to Lieutenant Jordan, Sanchez requested an explanation of the procedure the department had followed in removing merit pay and of the grievance procedure to challenge its removal. He indicated that he wished to pursue the grievance procedure, but first wanted to understand the complete procedure. Lieutenant Jordan informed him that Santa Ana City Council Resolution 58-281 covered the procedure the department had used in removing Sanchez's merit pay and that Section 10.77 of the Santa Ana Police Department's Rules and Regulations covered the grievance procedure to challenge its removal. Resolution 58-281 provides that an officer's merit pay may be removed upon the recommendation of the head of the police department and the approval of the City Manager. Section 10.77 permits an employee to present grievances concerning adverse personnel action through channels up to and including the Chief of Police. Lieutenant Jordan's letter made no reference to the City's grievance procedure, Santa Ana City Charter Section 1008, which grants the right to a hearing before the Santa Ana Personnel Board.

Beginning on May 6, 1989, Sanchez took a four-month medical leave of absence. By letter dated September 6, 1979, Sanchez advised the City that his doctor had conditionally released him to return to work. He requested information concerning his new work assignment, which the City provided the same day.

By letter dated September 10, 1979, Sanchez alleged that the removal of his merit pay was a demotion and a continuing pattern of discrimination which had caused him to suffer a stress reaction. He indicated that he would return to work only if his merit pay were restored.

Lieutenant Jordan phoned Sanchez on behalf of the City and denied his request for immediate restoration of his merit pay. Sanchez thereafter submitted a letter of resignation effective September 10, 1979.

Sanchez and two other former police officers filed in federal district court a complaint for damages and injunctive relief against the City, Chief Davis, and other named members of the department. The complaint alleged that the City had removed Sanchez's merit pay without due process of law, that Sanchez had been constructively discharged from his job, and that, as a result of emotional distress, he suffered from a work-related disability.

On February 7, 1983, the defendants filed a motion in limine, seeking in part a declaration that Santa Ana City Charter Section 1008, as amended, (the City's grievance procedure) was constitutional. Prior to its amendment in June 1978, Section 1008 granted to City employees whose pay had been reduced the right to a written statement of the charges leading to the pay reduction and the right to a hearing before the Santa Ana Personnel Board. The June 1978 amendment removed merit pay reductions from the coverage of Section 1008.

Sanchez responded by moving for summary judgment. He argued that the amended Section 1008 could not be applied retroactively to him because he had begun receiving merit pay prior to the effective date of the amendment, and that he had a property interest in his merit pay which could not be taken away without due process.

On June 3, 1983, the district court granted partial summary judgment in favor of Sanchez and against the City and Chief Davis on Sanchez's due process claim. The court concluded that the City had denied Sanchez due process in removing his merit pay, and that the denial of due process was a proper claim under 42 U.S.C. § 1983. The court subsequently exonerated Chief Davis of personal liability and reserved for trial the issue of the scope, nature and amount of damages against the City.

Following a trial on the issue of damages, the jury determined that the due process violation constituted a constructive discharge, and awarded Sanchez $400,000 in lost income and $500,000 for emotional distress. After the City's post-trial motions were denied, the City brought this appeal.

I. *The Summary Judgment In Favor of Sanchez*

The City advances four assignments of error: (a) Sanchez did not have a constitutionally protected property interest in his merit pay; (b) the grievance procedure available to Sanchez satisfied due process; (c) Sanchez waived his right to challenge the grievance procedure; and (d) Sanchez's due process claim is barred by *Parratt v. Taylor*, 451 U.S. 527 (1981). We reject these contentions.

(a) *Property interest in merit pay*

The City argues that Sanchez had no property interest in his merit pay. "The . . . due process guarantees of the fourteenth amendment apply only when a constitutionally protected liberty or property interest is at stake." *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Property interests are not created by the Constitution; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. *Id.*

[1] Sanchez correctly asserts that prior to its amendment in June 1978, Santa Ana City Charter Section 1008 (hereinafter "old Section 1008"), the grievance procedure in effect at the time Sanchez began receiving merit pay, created a constitutionally protected property interest in merit pay.

[2] A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. *See McGraw v. Huntington Beach*, 882 F.2d 384, 389 (9th Cir. 1989) (property cannot be defined by the procedures for its deprivation). But old Section 1008 did more than create an entitlement to an administrative appeal where a city employee's merit pay is removed. Old Section 1008 treated a reduction in pay as a demotion, and, by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City's authority to demote an employee to the specified reasons.[2] *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (classified civil service employee had property interest in continued employment because a state statute provided that such employees may not be dismissed except for certain specified reasons); *cf. Hogue v. Clinton*, 791 F.2d 1318, 1324 (8th Cir.) (discharged employee had no property interest in employment where grievance procedure merely provided an avenue to appeal the discharge and did not guide or restrict the employer's decision to terminate), *cert. denied*, 479 U.S. 1008 (1986).

[3] The City argues that Sanchez did not have a property interest in his merit pay at the time it was taken away because the removal of merit pay had been excluded from Section

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[2] Old Section 1008 provided in relevant part:

"Each or any of these actions relating to suspension, demotion, or dismissal may be taken by the officer having power of appointment to the position on the grounds of incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or City rules or the rules and regulations as provided in this Article, or failure to cooperate reasonably with his superiors or fellow employees. . . .

A reduction in pay shall be treated as a demotion under this Section. . . ."

1008's grievance procedure pursuant to the June 1978 amendment. This amendment, however, took effect *after* Sanchez had progressed to merit step E. As the City acknowledged at oral argument, under old Section 1008, once Sanchez began receiving merit pay, it would have continued automatically absent affirmative action on the part of the City to take it away. Sanchez thus had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008. The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending Section 1008. *See Olson v. Cory*, 27 Cal.3d 532, 609 P.2d 991, 164 Cal.Rptr. 217 (1980) (declaring unconstitutional the state's attempt to limit certain cost-of-living increases in judges' salaries by amending a state compensation system; the state was required to pay judges entering office prior to the amendment at the then-mandated salary level). The cases teach that Sanchez had a constitutionally protected property interest in his merit pay prior to the amendment of Section 1008.[3]

(b) *Adequacy of the City's procedure*

The City next contends that, even if Sanchez had a property interest in his merit pay, the procedure the City followed in removing his merit pay satisfied federal due process. The district court correctly held that the procedures the City followed did not satisfy due process.

"Whether deprivation of a property right implicates a due process right to a hearing is a matter of federal constitutional law." *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987),

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[3] The City's reliance on *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984), is misplaced. In *Veit*, we held that a federal civil service employee did not have a property interest in receiving a merit pay increase. *Id.* at 511. Here, in contrast, Sanchez had been receiving merit pay for nearly one year and, short of affirmative action on the City's part, would have continued to receive it.

cert. denied, 486 U.S. 1033 (1988). Due process generally requires " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' "[4] *Loudermill,* 470 U.S. at 542 (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)) (emphasis in original).

Sanchez does not contend, nor must he contend, that he should have been given a pre-removal hearing. He was entitled to an administrative appeal, or a post-removal hearing, to challenge the final decision to eliminate his merit pay. He received no hearing or an opportunity to be heard at any time.

[4] It is undisputed that Sanchez was entitled to an administrative appeal under California law. Section 3304(b) of the state Bill of Rights Act provides that no punitive action may be taken against a police officer without providing the officer with an opportunity for an administrative appeal. *Baggett v. Gates,* 32 Cal.3d 128, 141, 649 P.2d 874, 881, 185 Cal.Rptr. 232, 239 (1982). Section 3303 defines "punitive action" to include a reduction in salary. *Id.*

Because Sanchez was never given an opportunity for a hearing of any kind to contest the removal of his merit pay,[5] his property interest was taken without due process.

(c) *Waiver*

The City next argues that Sanchez waived his right to challenge the grievance procedure on the ground that Sanchez never submitted a written memorandum to or made an appointment with Chief Davis, despite Captain Hansen's written instructions that this was the first step in the grievance procedure. The City further argues that Sanchez's March 30, 1979 memorandum to Chief Davis and April 25, 1979 memorandum to Lieutenant Jordan merely evidence an attempt to obtain information prior to instituting the grievance procedure, not an attempt to institute the grievance procedure. This argument also fails to excuse the denial of any kind of procedural review.

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[4] Two well-established exceptions exist: (1) where the property deprivation is the result of random and unauthorized conduct by a state employee such that meaningful predeprivation process is not possible; or (2) where protection of the public interest requires an immediate seizure of property without a hearing. *See Sorrano's Gasco,* 874 F.2d at 1317-18.

[5] Because Sanchez does not contend that he was entitled to a hearing prior to the removal of his merit pay, we do not reach the abstract issue of whether Sanchez was entitled to a pre-removal hearing.

"A waiver of a constitutional right is 'not to be implied and is not lightly to be found.' " *Ostlund,* 825 F.2d at 1373 (quoting *United States v. Provencio,* 554 F.2d 361, 363 (9th Cir. 1977)). It must be knowing and voluntary. *Id.*

[5] The facts do not support the City's contention that Sanchez waived his right to a hearing. City Charter Section 1008, the City's grievance procedure, provides that a City employee who has suffered a pay reduction is entitled to a written statement of the charges leading to the pay reduction. In accordance with Section 1008, Sanchez attempted to invoke the grievance procedure by requesting a written statement of the charges against him in his March 31, 1979 memorandum to Chief Davis, to which Chief Davis never responded. Not surprisingly, his subsequent memos to Captain Hansen and Lieutenant Jordan sought to clarify the grievance procedure after Chief Davis failed to respond to Sanchez's initial memorandum invoking the grievance procedure. Sanchez has not waived his right to challenge the procedure.

(d) Parratt v. Taylor

We also reject the City's argument that *Parratt v. Taylor,* 451 U.S. 527 (1981), bars Sanchez's due process claim. Because Sanchez sought only a post-deprivation hearing and it was denied, *Parratt,* which addresses when pre-removal hearings are required, is plainly inapplicable.

The City argues for the first time in its reply brief that Sanchez's § 1983 claim against the City must fail because Sanchez did not establish that the City's policy makers acted to deprive him of due process. As a general rule, an appellant may not raise an argument for the first time in a reply brief. *See Northwood Acceptance Corp. v. Lynnwood Equipment*, 841 F.2d 918, 924 (9th Cir. 1988). The City offers no justification for departure from this rule, and we therefore decline to address its argument.

II. *The Damage Award*

The City challenges the jury's verdict granting Sanchez $400,000 in lost income and $500,000 for emotional distress on the following grounds: (a) the City's single act of removing Sanchez's merit pay cannot a constitute constructive discharge as a matter of law; (b) damages for emotional distress were barred by Sanchez's state workers' compensation award; and (c) it was prejudicial error for the district court to refuse to instruct the jury that a directed verdict had been entered in the City's favor on all of Sanchez's other claims. We affirm the damage award for lost income but vacate the award for emotional distress.

(a) *Constructive discharge*

The City contends that the removal of Sanchez's merit pay, standing alone, is insufficient as a matter of law to support a finding of constructive discharge because a single, isolated incident of employment discrimination is insufficient to establish constructive discharge. We reject this contention.

An employee who resigns, as Sanchez did, cannot secure backpay unless his employer constructively discharged him. *Satterwhite v. Smith*, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984). "A constructive discharge occurs when, looking at the totality of the circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.' " *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)(quoting *Satterwhite*, 744 F.2d at 1381).

Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989). In general, however, a single isolated incident is insufficient as a matter of law to support a finding of constructive discharge. *Watson*, 823 F.2d at 361. Thus, a plaintiff alleging a constructive discharge must show some " 'aggravating factors,' such as a 'continuous pattern of discriminatory treatment.' " *Satterwhite*, 744 F.2d at 1382 (quoting *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981)).

[6] The removal of Sanchez's merit pay coupled with the attending aggravating factors in the record permitted a trier of fact to conclude that a reasonable person would have felt compelled to quit. The removal of Sanchez's merit pay is more properly viewed as two discrete incidents. Sanchez lost his merit step E pursuant to a negative evaluation prepared by Sergeant Collins, Sanchez's immediate supervisor. He lost his merit pay step D pursuant to Captain Hansen's recommendation to Chief Davis.

Moreover, significant aggravating factors were present. Sanchez lost his merit pay step E on the same day that he left work suffering from a stress reaction. His merit pay step D was removed while he was on an approved medical leave of absence. Most significantly, Sanchez's repeated attempts to invoke the grievance procedure were rebuffed.

(b) *The state worker's compensation award*

[7] The City contends that Sanchez's claim in federal court for emotional distress is barred under res judicata principles by his state workers' compensation award. On this point the City prevails.

Sanchez had previously filed two claims with the California Workers' Compensation Appeals Board for emotional injuries arising out of the loss of his merit pay. Pursuant to the parties' stipulation, the appeals board found that Sanchez's stress-related injuries caused a permanent disability of 30% and awarded him $8,662.50 for the period between the City's removal of Sanchez's merit pay in March 1979 and Sanchez's medical leave of absence in May 1979. The appeals board further determined that it lacked the authority to award pay during Sanchez's leave of absence and that his resignation on September 10, 1979 precluded his claim for entitlement to further benefits.

Preliminarily, we reject Sanchez's contention that the City has waived its right to assert res judicata. Res judicata is an affirmative defense and is ordinarily waived if not specially pleaded. Fed. R. Civ. P. 8(c); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984). "[A] preclusion defense that arises after the pleadings have been filed can be raised only by a motion for leave to file a supplemental answer under [Federal Rule of Civil Procedure] 15(d)." *Id.* We liberally construe such attempts to raise the defense as motions for leave to file a supplemental answer. *Id.*

The City could not have raised a preclusion defense in its August 14, 1980 answer because Sanchez did not receive the compensation award until November 12, 1981. The City raised the issue in its "Brief re. Allowable Damages" in October 1985. While considerable time had passed since the date of the award, the City did raise the issue prior to the trial on damages, thus giving Sanchez " 'notice of the plea of estoppel and a chance to argue . . . why the imposition of an estoppel would be inappropriate.' " *Id.* (quoting *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S.

313. 350 (1971)). We therefore hold that the City has not waived its right to assert preclusion of that claim.

Whether Sanchez's compensation award for emotional injuries bars under res judicata principles his section 1983 claim for damages for emotional distress is answered by state law. *See Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir.), *cert. denied*, _ U.S. _, 109 S. Ct. 60 (1988).

[8] California law provides that if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided thereunder constitute the exclusive remedy against the employer. *See* Cal. Labor Code § 3601; *Hollywood Refrigeration Sales Co., Inc. v. Superior Court*, 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). Here, Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award of $500,000 for emotional distress.[6]

(c) *Directed verdict*

The City contends that the district court erred by not instructing the jury that a directed verdict had been entered in the City's favor on all of Sanchez's claims except for the due process violation. This error was prejudicial, the City argues, because by failing to indicate that a directed verdict had been entered in the City's favor, the district court implicitly "gave the impression that it was finding against the City regarding the claims alleged over the 39 days [of trial]." Appellee's Brief at 18. We find no error.

The district court has wide latitude in tailoring jury instructions. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). We view jury instructions as a whole, and examine them to determine whether they "fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Id.* An error in instructing the jury does not require reversal if it is more probably than not harmless. *Course v. A.H. Robins Co. Inc.*, 764 F.2d 1329, 1337 (9th Cir.), *modified*, 773 F.2d 1049 (9th Cir. 1985).

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[6] The City also contends that there was insufficient evidence to establish that the jury's award of damages for emotional distress stemmed from the due process violation. Because we vacate the award of damages for emotional distress on other grounds, it is unnecessary to address this issue.

[9] The district court had no duty to inform the jury that a directed verdict had been entered in the City's favor on counts that were not being submitted. The only issue before the jury was the scope, nature, and amount of damages on Sanchez's § 1983 due process claim; liability had already been fixed by the district court's earlier partial summary judgment order. The district court permitted Sanchez's counsel to read the order granting partial summary judgment, thus focusing the jury's attention on the issue of damages on the due process claim. Considering the jury instructions as a whole, we conclude that the district court did not commit prejudicial error in failing to inform the jury that a directed verdict had been entered on claims not properly before the jury.[7]

We therefore affirm the summary judgment on Sanchez's due process claim. We affirm the jury's damage award for lost income. We vacate the damage award for emotional distress. Neither party is entitled to costs or attorney fees on appeal.

AFFIRMED IN PART; VACATED IN PART.

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[7] The City similarly argues that the district court gave the impression that the plaintiffs' claims had survived by allowing Caro and Torres, Sanchez's co-plaintiffs on other discrimination claims, to sit at the counsel table with Sanchez. The district court, however, clearly informed the jury that the only issue before it was the damages stemming from the procedural due process violation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES; ROBERT CARO, *Plaintiffs-Appellees,* v. CITY OF SANTA ANA, *Defendant-Appellant,* and CITY OF SANTA ANA POLICE DEPARTMENT; DON BOTTS; RAYMOND C. DAVIS; E. B. HANSEN; ROBERT STEBBENS; NORWOOD WILLIAMS; LEE DRUMMOND; LAWRENCE PITZER; MICHAEL LLEWELLYN; DALE STERZER; GARY DIXON; JOHN COLLINS; JOHN MCDANIELS; MICHAEL LANNERS; WILLIAM BRUNS; JOHN DITTUS; RICHARD FAUST; JOHN MCCLAIN, *Defendants.*	Nos. 86-6386 88-5855 D.C. No. CV-79-1818-KN

Filed February 22, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and
Diarmuid F. O'Scannlain,
Circuit Judges.

ORDER

The panel has voted unanimously to deny the petitions for rehearing. Judges Schroeder and O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35(b).

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jesse J. Sanchez; Victor Torres;
Robert Caro,
Plaintiffs-Appellants,

v.

City of Santa Ana; City of Santa
Ana Police Department; Don
Botts; Raymond C. Davis; E. B.
Hansen; Robert Stebbens;
Norwood Williams; Lee
Drummond; Lawrence Pitzer;
Michael Lewellen; Dale Sterzer;
Gary Dixon; John Collins; John
McDaniels; Michael Lanners;
William Bruns; John Dittus;
Richard Faust; John McClain,
Defendants-Appellees.

Nos. 85-6504,
86-6226, 87-5614,
88-5853

D.C. No.
CV-79-1818-KN

OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding[*]

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

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[*] Judge Irving Hill, District Judge for the Central District of California, presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part, reversing in part, and remanding judgments of the district court, the court of appeals held that summary judgment in favor of the City of Santa Ana was improper because the district court misapplied *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976), to former police officers' claims of discriminatory lateral promotion policies.

Appellants Jesse Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department, appealed district court judgments in their action against the City of Santa Ana and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a).

[1] Appellants claimed that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. [2] F.R. Civ. P. 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. [3] The district court did not abuse its discretion in denying access to these files. While appellants demonstrated the relevance of statistics to their suit, they failed to show that discovery of the files was necessary. Focused discovery could have been employed. Appellants failed to show prejudice from the denial of their full discovery request.

[4] Appellants contended that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers laterally hired from other police departments. Appellants challenged the district court's finding that these pay and promotion claims were governed by *LULAC*. The court agreed that the district court misapplied *LULAC*. [5] The district court in this case held that *LULAC* governed all aspects of lateral transfers including credits, salary and classification. *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from these policies. Moreover, the bilingual lateral transfer program began in 1974-1975 following the initiation of the *LULAC* suit. Because the district court misapplied *LULAC*, the court reversed the grant of summary judgment on this issue and remanded for consideration of appellants' claim.

[6] The district court denied class certification primarily upon a finding that the three no-longer-employed appellants failed to meet the commonality and typicality requirements, and the court found this ruling to be correct.

[7] Caro claimed that the district court erred in granting summary judgment to appellees on his pre-termination claims based on a finding that the claims were barred by res judicata. [8] In California, to whose law the court looked for the applicable res judicata and collateral estoppel principles, res judicata precludes a plaintiff from litigating a claim if the claim relates to the same primary right as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action. Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action.

[9] Appellants alleged the existence of a racially discriminatory atmosphere at the SAPD, contending that enough evi-

dence was presented that a reasonable jury could have found the existence of a hostile work environment. The court agreed that reasonable jurors could conclude that a discriminatory atmosphere was countenanced by the chief of police and allowed to exist at SAPD. The court remanded this claim for submission to a jury, but limited the remand to Sanchez's and Torres' claims against the City.

[10] Sanchez and Torres alleged that they were unlawfully retaliated against for exercising their first amendment rights. Because the court's review of the record indicated that reasonable jurors could find retaliation on one or more of these claims, the court remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez, and the potential liability of Lieutenants Lewellen, Sterzer, and Pitzer and Sergeant Bruns to Torres. The court affirmed the directed verdicts in favor of the City and the remaining defendants, holding that the specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers.

[11] The individual appellants contended that they are immune from liability, but the court held that the district court erred in ruling that the appellants were entitled to immunity because the law in this area was insufficiently clear. **[12]** The causes of action upon which the court reversed the directed verdict involved particular rights that were clearly established at the time of the alleged incidents. For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression. Governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination.

COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana,* Nos. 86-6386, 88-5827, 88-5855, slip op. _ (9th Cir. 1990).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. *See generally League of United Latin Am. Citizens (LULAC) v. City of Santa Ana,* 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examination, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "supersensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that various defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were assigned to LPOA members and that they did not receiving adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants

Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, however, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez,* slip op. at __.

On May 18, 1979, Sanchez, Torres and Carc filed a complaint seeking damages and injunctive relief for violations of their civil rights.[1] Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

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[1] On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's complaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded $471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

JURISDICTION

All but five of the defendants[2] contend that this court lacks jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not timely appeal from the certified judgment. We reject this contention.[3]

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).[4]

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

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[2] Defendants Collins, Dittus, Faust, Lanner and McDaniel.

[3] A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

[4] Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.[5]

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[5] The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means

PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd,* 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd,* 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents,* 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky,* 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone &*

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non-clerical errors; it is not referring to the magnitude of the error. *Waggoner,* 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

Telegraph, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, _ U.S. _, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. *See Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*, _ U.S. _, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers hired laterally from other police departments.[6] Plaintiffs challenge the district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionally few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

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[6] Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, _ U.S. _, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 779 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by res judicata. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the res judicata defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara,* 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk,* 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable res judicata and collateral estoppel principles, *Punton v. City of Seattle,* 805 F.2d 1378, 1380 (9th Cir. 1988), *cert. denied,* 481 U.S. 1029 (1989), res judicata precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo,* 775 F.2d at 1366, (citing *Slater v. Blackwood,* 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.,* 456 U.S. 461, 480-81 (1982); *Allen v. McCurry,* 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer,* 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. *See Migra v. Warren City School Dist. Bd of Ed.,* 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer,* 456 U.S. at 461 (claim and issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd, Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

A. Discriminatory Environment

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment.[7] We agree that

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[7] Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McClean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363, 2374-75 (1989). Title

reasonable jurors could conclude that a discriminatory atmosphere was countenanced by the chief of police and allowed to exist at the SAPD. Accordingly, this claim is remanded to the district court for submission to a jury. We limit this remand, however to Sanchez's and Torres's claims against the City,[8] Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeants Dixon and Faust. The jury would be entitled to know about Sanchez's award on his due process claim, however, to avoid double recovery. The record contains no evidence to support a claim against the remaining defendants. Caro's claims are barred.

It is well-settled that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."[9] *Meritor Sav-*

VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson, et al.*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.

[8] While the Supreme Court has restricted the application of sections 1981 and 1983 to public employers, *see Jett v. Dallas Independent School Dist.*, — U.S. —, 109 S. Ct. 2702 (1989) (rejecting *respondeat superior* as a basis for holding a state actor liable under section 1983 for violation of rights under section 1981); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978) (municipality may only be liable for violations of section 1983 where the violation was caused by "a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112 (clarifying the requirements established in *Monell*), the Supreme Court has not indicated that a public employer cannot be held liable for violations of Title VII under the theory of *respondeat superior*. *See Collins v. City of San Diego*, 841 F.2d 337 (9th Cir. 1988) (discussing *respondeat superior* liabiity).

[9] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex or national orgin" 42 U.S.C. § 2000e - 2(a)(1).

ings Bank, 477 U.S. at 64 (1984); *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972). The creation of a racially discriminatory or hostile work environment is actionable under Title VII. *See Katz v. Dole,* 709 F.2d 251, 254-55 (4th Cir. 1983); *Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982); *Rogers,* 454 F.2d at 238; *Smithberg v. Merico Inc.,* 575 F. Supp. 80 (C.D. Cal. 1983).

The seminal case on hostile work environment comes from the Fifth Circuit. In *Rogers,* the court announced the principle that an employee's psychological well-being is statutorily protected from a discriminatory work environment. 454 F.2d 234. The Supreme Court affirmed this principle and applied it to sexual harassment cases in *Meritor Savings Bank.* 477 U.S. at 56-66. Both courts stated, however, that "an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee [does not fall] within the proscription of Section 703 [of Title VII]" *Meritor Savings Bank,* 477 U.S. at 67; *Rogers,* 454 F.2d at 238.

Plaintiffs allege more than a "mere utterance of an ethnic or racial epithet." They presented testimony that Lieutenant Williams, Sergeants Dixon and Faust made racial slurs and objected to Spanish being spoken during informal conversations. Chief Davis and Captains Hansen and Stebbens allegedly permitted racial slurs and contributed to the hostile environment by their reactions to the LPOA and treatment of its members. Evidence that members of the SAPD posted offensive cartoons in the SAPD work space was also presented. Based on this evidence in combination with plaintiffs' other evidence of racial tensions surrounding the sergeant's examination and the LPOA, reasonable persons could conclude that a hostile atmosphere existed at the SAPD. Reasonable jurors could also find that one or more of the above-named defendants could have contributed to this atmosphere, and that Sanchez and Torres were victims of this hostility. The district court therefore erred in directing a verdict in favor of these defendants; Sanchez and Torres are entitled to a jury determination of whether a violation of Title VII was committed, and by whom, and what damages, if any, flowed therefrom. The district court must also determine whether the City can be liable under common law principles of *respondeat superior* for any violations which the court may find the officers liable. *See Meritor Savings Bank,* 477 U.S. at 72 (issue of employer liability cannot be decided until record below is developed as to individual liability).

B. First Amendment Claims

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez,[10] and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell,* 436 U.S. at 690-91; *Praprotnik,* 485 U.S. at 122-23. Plaintiffs failed to prove the existence of such a policy or custom.

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Mor-*

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[10] In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. *See Sanchez,* at slip op. —

gan, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States,* 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied,* 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. *See Connick v. Myers,* 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.,* 391 U.S. 563 (1968); *Allen v. Scriber,* 812 F.2d 426 (9th Cir.), *amended,* 828 F.2d 1445 (1987).

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. *See Allen,* 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, Sanchez was formally reprimanded for his reporting of the cartoon, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized in his interview for the ATL position and received poor reviews. These claims of first amendment retaliation are therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick*, 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen*, 812 F.2d at 432; *Boyd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied*, 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

C. Discrimination/Retaliation

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants violated sections 1981, 1983, and Title VII by retaliating against them because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.[11] There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

D. Conspiracies

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstructed justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class race-based animus. *See Kush,* 460 U.S. 719; *Griffin v. Breck-*

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[11] Our decision to vacate the award of $500,000 for emotional distress injury because it is barred by principles of res judicata, *see Sanchez,* slip op. at ___, does not affect our decision here.

enridge, 403 U.S. 88 (1971); *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by res judicata. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.[12]

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi,* 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen,* 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton,* 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984).

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[12] Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing non-discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id. See also Anderson v. Creighton,* 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. *See Connick v. Myers,* 461 U.S. 138 (1983)("for at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County,* 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds,* _ U.S. _, 109 S. Ct. 1736 (1989); *Flores v. Pierce,* 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied,* 449 U.S. 875 (1980); *Rogers,* 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Employment Opportu-*

nity Commission, 434 U.S. 412 (1978). *See also Hughes v. Rowe,* 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen,* two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.,* 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the *LULAC* litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

There was no abuse of discretion in the district court's decision to deny attorney's fees to Sanchez. Sanchez came out of the case with adequate funds to pay his fees and costs.

The parties will bear their own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellants,
v.
CITY OF SANTA ANA; CITY OF SANTA
ANA POLICE DEPARTMENT; DON
BOTTS; RAYMOND C. DAVIS; E. B.
HANSEN; ROBERT STEBBENS;
NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LEWELLEN; DALE STERZER;
GARY DIXON; JOHN COLLINS; JOHN
MCDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN MCCLAIN,
Defendants-Appellees.

Nos. 85-6504;
86-6226, 87-5614,
88-5853

D.C. No.
CV-79-1818-KN

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990
Amended February 27, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

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*Judge Irving Hill, District Judge for the Central District of California, presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part, reversing in part, and remanding judgments of the district court, the court of appeals held that summary judgment in favor of the City of Santa Ana was improper because the district court misapplied *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976), to former police officers' claims of discriminatory lateral promotion policies.

Appellants Jesse Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department, appealed district court judgments in their action against the City of Santa Ana and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a).

[1] Appellants claimed that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. [2] F.R. Civ. P. 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. [3] The district court did not abuse its discretion in denying access to these files. While appellants demonstrated the relevance of statistics to their suit, they failed to show that discovery of the files was necessary. Focused discovery could have been employed. Appellants failed to show prejudice from the denial of their full discovery request.

[4] Appellants contended that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers laterally hired from other police departments. Appellants challenged the district court's finding that these pay and promotion claims were governed by *LULAC*. The court agreed that the district court misapplied *LULAC*. **[5]** The district court in this case held that *LULAC* governed all aspects of lateral transfers including credits, salary and classification. *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from these policies. Moreover, the bilingual lateral transfer program began in 1974-1975 following the initiation of the *LULAC* suit. Because the district court misapplied *LULAC*, the court reversed the grant of summary judgment on this issue and remanded for consideration of appellants' claim.

[6] The district court denied class certification primarily upon a finding that the three no-longer-employed appellants failed to meet the commonality and typicality requirements, and the court found this ruling to be correct.

[7] Caro claimed that the district court erred in granting summary judgment to appellees on his pre-termination claims based on a finding that the claims were barred by res judicata. **[8]** In California, to whose law the court looked for the applicable res judicata and collateral estoppel principles, res judicata precludes a plaintiff from litigating a claim if the claim relates to the same primary right as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action. Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action.

[9] Appellants alleged the existence of a racially discriminatory atmosphere at the SAPD, contending that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment. This was a mischaracterization of the record. The court thus affirmed judgment to the defendants.

[10] Sanchez and Torres alleged that they were unlawfully retaliated against for exercising their first amendment rights. Because the court's review of the record indicated that reasonable jurors could find retaliation on one or more of these claims, the court remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez, and the potential liability of Lieutenants Lewellen, Sterzer, and Pitzer and Sergeant Bruns to Torres. The court affirmed the directed verdicts in favor of the City and the remaining defendants, holding that the specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers.

[11] The individual appellants contended that they are immune from liability, but the court held that the district court erred in ruling that the appellants were entitled to immunity because the law in this area was insufficiently clear. **[12]** The causes of action upon which the court reversed the directed verdict involved particular rights that were clearly established at the time of the alleged incidents. For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression. Governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination.

COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

ORDER

The opinion filed July 11, 1990 is amended as follows:

Slip op. at 7007, line 5: delete "receiving" and replace it with "receive".

Slip op. at 7021, line 16: delete "and Sergeant Dittus" insert "and" prior to "Lieutenant Williams".

Slip op. at 7022, lines 31-32: delete "Sanchez was formally reprimanded for his reporting of the cartoon,".

Slip op. at 7018, last line - 7021, lines 1-8: delete footnote 7 and text beginning with "We agree that . . ." and ending with "below is developed as to individual liability)." and insert the following:

> . . . This is a mischaracterization of the record. We affirm judgment to the defendants.
>
> Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union*, _ U.S. _, 109 S. Ct. 2363, 2374-75

(1989). Title VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson,* 109 S. Ct. at 2374.[7]

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. *See Slack v. Havens,* 522 F.2d 1091, 1094 (9th Cir. 1975); *cf. Miller v. Fairchild Indus., Inc.,* 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied,* ___ U.S. ___, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether

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[7] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

> the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.
>
> Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service,* 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous standard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed de novo. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.
>
> We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

Slip op. page 7021, lines 24-25: delete "*Monell,* 436 U.S. at 690-91; *Praprotnik,* 485 U.S. at 122-23." insert "*Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 122-23 (1988)."

Slip op. page 7028, lines 32-34: delete "There was no abuse of discretion in the district court's decision to deny attorney's fees to Sanchez. Sanchez came out of the case with adequate funds to pay his fees and costs." insert

> The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights

> suit is a prevailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " *Texas State Teachers Ass'n v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990).

Slip. op. page 7024, line 20: delete "obstructed" and insert in its place "obstruct".

Slip op. page 7026, line 14: delete "non-discretionary" and insert in its place "discretionary".

Slip op. page 7005, 1st full paragraph of opinion text, lines 11-12: delete "Nos. 86-6386, 88-5827, 88-5855, slip op. _ (9th Cir. 1990)." and insert in its place "915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855)."

Slip op. page 7021, footnote 10, line 4: delete "*Sanchez*, at slip op. _" and replace it with "*Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990).

Slip op. page 7024, footnote 11, lines 2-3: delete "slip op. at ___," and replace it with "915 F.2d at 431-32,"

With these amendments the parties' petitions for rehearing are denied. Judges Schroeder and O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Goodwin so recommends.

OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. *See generally League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examination, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "supersensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that various defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were assigned to LPOA members and that they did not receive adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, however, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez,* slip op. at _.

On May 18, 1979, Sanchez, Torres and Caro filed a complaint seeking damages and injunctive relief for violations of their civil rights.[1] Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's complaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

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[1] On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded $471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

JURISDICTION

All but five of the defendants[2] contend that this court lacks jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not timely appeal from the certified judgment. We reject this contention.[3]

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[2] Defendants Collins, Dittus, Faust, Lanner and McDaniel.

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).[4]

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

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[3] A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

[4] Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.[5]

PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

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[5] The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means non-clerical errors; it is not referring to the magnitude of the error. *Waggoner*, 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky*, 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, _ U.S. _, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. *See Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*, _ U.S. _, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers hired laterally from other police departments.[6] Plaintiffs challenge the district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

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[6] Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionally few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, _ U.S. _, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.*, 780 F 2d 776, 779 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by res judicata. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the res judicata defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable res judicata and collateral estoppel principles, *Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1988), *cert. denied*, 481 U.S. 1029 (1989), res judicata precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo*, 775 F.2d at 1366, (citing *Slater v. Blackwood*, 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. *See Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer*, 456 U.S. at 461 (claim and issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd, Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

A. Discriminatory Environment

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment. . . . . This is a mischaracterization of the record. We affirm judgment to the defendants.

Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union,* _ U.S. _, 109 S. Ct. 2363, 2374-75 (1989). Title VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson,* 109 S. Ct. at 2374.[7]

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[7] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. *See Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *cf. Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.

Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous standard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed de novo. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of

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with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.

We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

B. First Amendment Claims

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, and Lieutenant Williams to Sanchez,[8] and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122-23 (1988). Plaintiffs failed to prove the existence of such a policy or custom.

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. *See Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.*, 391 U.S. 563 (1968); *Allen v. Scriber*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (1987).

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[8] In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. *See Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990.)

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. *See Allen*, 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized in his interview for the ATL position and received poor reviews. These claims of first amendment retaliation are therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick*, 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen*, 812 F.2d at 432; *Boyd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied*, 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

C. Discrimination/Retaliation

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants violated sections 1981, 1983, and Title VII by retaliating against them because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.[9] There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

D. *Conspiracies*

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstruct justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class race-based animus. *See Kush*, 460 U.S. 719; *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

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[9] Our decision to vacate the award of $500,000 for emotional distress injury because it is barred by principles of res judicata, *see Sanchez*, 915 F.2d at 431-32, does not affect our decision here.

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by res judicata. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.[10]

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

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[10] Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id. See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. *See Connick v. Myers*, 461 U.S. 138 (1983)("for at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds*, _ U.S. _, 109 S. Ct. 1736 (1989); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied*, 449 U.S. 875 (1980); *Rogers*, 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's action is "frivolous, unreasonable, or without foundation."

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). *See also Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen*, two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the *LULAC* litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights suit is a prevailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " *Texas State Teachers Ass'n v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990).

The parties will bear their own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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APPENDIX H

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, et al.,) Case No.
) CV 791818KN
Plaintiffs,)
) PARTIAL
v.) SUMMARY
) JUDGMENT
CITY OF SANTA ANA, et al.,)
)
Defendants.)
)

Plaintiff's Motion for Partial Summary Judgement came on regularly for hearing on March 11, 1983. The Court, through as order entered on April 11, 1983, requested supplemental briefing on this motion. The requested supplemental briefing having been received and considered, and the Court having considered all of the papers filed on this motion prior to the hearing, and the oral argument of counsel at the hearing, and it appearing that there is no issue of material fact and plaintiffs are entitled to partial judgement as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgement be entered on behalf of plaintiff Sanchez and against defendants City of Santa Ana and Raymond C. Davis, to wit: that plaintiff Sanchez was denied due process of law in the removal of his merit pay steps in March 1979; further, that said denial of due process of law is remediable pursuant to 42 U.S.C. Section 1983, such remedy, including claims for injunctive relief and damage, requiring trial as to the nature, scope and amount therefor.

Dated: This 27th day of May, 1983

Signature
DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, et al.,) Case No.
) CV 791818KN
Plaintiffs,)
) FINDINGS OF
v.) FACT AND
) CONCLUSIONS
CITY OF SANTA ANA, et al.,) OF LAW
)
Defendants.)
)

FINDINGS OF FACT

1. Santa Ana City Charter Section 1008 has provided, since June 1, 1978 to the present, in relevant part:

> (i) A reduction in pay shall be treated as a demotion under this section, unless the reduction in pay is part of a plan of reclassification of positions or of a plan to reduce salaries and wages in

connection with a general economy or curtailment program, or is the result of a finding by the appointing authority that the employee's performance does not justify the continuance of a level of pay that is dependent upon meritorious service.

2. City Charter Section 1008, from September 16, 1975 to the present, has provided that a demoted employee is entitled to a number of rights, including the right to an administrative appeal.

3. Plaintiff Sanchez was hired by Santa Ana Police Department (SAPD) on September 16, 1975 as a police officer at salary step C, and progressed to merit salary step E (2 steps) on April 1, 1978.

4. On March 15, 1979, plaintiff Sanchez' merit step E was removed, retroactive to March 1, 1979.

5. On March 26, 1979, plaintiff Sanchez' merit step D was removed,

effective April 1, 1979.

6. The removal of plaintiff Sanchez' merit pay steps was approved by defendant Chief Davis.

7. As a consequence of these merit pay step removals, there was a decrease in Sanchez' monthly pay of approximately $159.00.

8. Upon removal of his merit pay steps, plaintiff Sanchez was entitled to reconsideration for reinstatement of one or both merit steps after six (6) months, but was not entitled to automatic, or even presumptive, reinstatement.

9. On March 30, 1979 plaintiff Sanchez made a timely written demand for a written statement of charges, seeking to initiate the administrative appeal provisions of City Charter Section 1008 (re Demotions), in the manner required by said Charter Section.

10. On April 13, 1979. plaintiff Sanchez reiterated his efforts to initiate an administrative appeal.

11. The only response plaintiff Sanchez received to his requests for an administrative appeal was that he was informed that he could appeal the decision to defendant Chief Davis.

12. Defendant City of Santa Ana is a Charter City under the governing statutes of the State of California.

13. The removal of plaintiff Sanchez' merit pay steps was performed in accordance with a policy of the City of Santa Ana.

CONCLUSIONS OF LAW

1. Property interests in employment positions must be determined by local ordinances, state law, or employment contracts Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Kersey v. Shipley, 673 F.2d 730, 732 (4th Cir. 1982), cert.

denied, 103 S. Ct. 375.

2. The California Supreme Court has clearly held that, under California law, a police officer is entitled to an administrative appeal for a reduction in salary. *White v. County of Sacramento*, 31 Cal. 3d 676, 679-684 (1982), *Bagget v. Gates*, 32 Cal. 3d 128, 141 (1982).

3. Since the removal of plaintiff Sanchez' merit pay steps constituted a reduction in salary, the failure to provide plaintiff Sanchez with an administrative appeal of this removal was a denial of due process of law.

4. Any of the above Findings of Fact may be considered a Conclusion of Law. and any of the above Conclusions of Law may be considered a Finding of Fact.

Dated: This 27th day of May, 1983.

Signature
DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, et al.,) Case No.
) CV 791818KN
Plaintiffs,)
) JUDGMENT
v.) ON THE
) VERDICT
CITY OF SANTA ANA, et al.,)
)
Defendants.)
)

This cause having been tried by the court and a jury, before the Honorable David V. Kenyon, Judge presiding, and the issues having been duly tried and the Jury having duly rendered it's verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) Jesse J. Sanchez have and recover of and from the defendant(s)

City of Santa Ana the sum of $900,000.00 Dollars, together with costs, taxed in the sum of To be determined by the Clerk

Dated: 11-1-85

Edward M. Kritzman, Clerk
United States District Court
By L. Wallace Deputy Clerk

APPENDIX J

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, et al.,) Case No.
) CV 791818KN
Plaintiffs,)
)
v.) FINAL
) JUDGMENT
CITY OF SANTA ANA, et al.,)
)
Defendants.)
)

This action pursuant to 42 U.S.C. Sects. 1981, 1983, 1985 and 1986 having come on trial before a jury; the Court having directed a verdict and entered judgement as to certain Defendants: the court having entered judgement as to certain Defendants: the Court having entered judgement for Defendant City of

Santa Ana on all claims under 42 U.S.C.Sect. 2000(e); the Court having issued partial summary judgement as to one Plaintiff, and the jury having issued verdicts as to the damages thereon; the Court having made certain findings as to the prevailing parties and for apportionment for purposes of attorney's fees; and the Court having denied the motion of Defendant City of Santa Ana for a new trial and directed entry of a single final judgement:

IT IS HEREBY ADJUDGE AND DECREED as follows:

1. Each of the aforementioned orders, directed verdicts, jury verdicts, and prevailing party and attorney fees apportionment determinations, as well as all previously entered findings, orders and judgements herein, are subsumed into this Final Judgement as though fully set forth

herein;

2. Final Judgement is entered for Defendants DAVIS, HANSEN, BOTT, DRUMMOND, WILLIAMS, STERZER, STEBBINS, PITZER, BRUNS, McCLAIN, LEWELLEN, DIXON, COLLINS, LANNERS, FAUST, McDANIEL and DITTUS on all claims as to all Plaintiffs;

3. Final Judgement is entered for Defendant City of Santa Ana on all claims as to Plaintiff's CARO and TORRES:

4. Final Judgement is entered for Plaintiff SANCHEZ on his due process claim pursuant to 42 U.S.C. Sect. 1983 as to Defendant City of Santa Ana, in the amounts of the jury verdicts: $400,000.00 for lost income and $500,000.00 for compensatory damage for a total of $900.000; Plaintiff SANCHEZ takes nothing on his remaining claims as to Defendant City of Santa Ana;

5. The fee award determinations and apportionments the reasonableness of

attorneys fees and costs, the actual rates of compensation of attorneys fees, and matters related thereto, are reserved for further proceedings, but shall not stay entry of this final judgement. Fed. R. Civ. Proc. 58, Local Rule, 16.10.

Dated: July 22, 1986

Signature
DAVID V. KENYON
JUDGE OF THE DISTRICT COURT

APPENDIX K

CALIFORNIA LABOR CODE

3600. Liability for compensation; conditions of compensation; credits against judgment or settlement.

(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4508, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence.

(4) Where the injury is not caused by the intoxication of the injured employee.

(5) Where the injury is not intentionally self-inflicted.

(6) Where the employee has not willfully and deliberately caused his or her own death.

(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(8) Where the injury is not caused by the commission of a felonious act by the injured employee, for which he or she has been convicted.

(9) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where those activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision.

(b) Where an employee, or his dependents, receives the compensation provided by this division and secures a judgement for, or settlement of, civil damages pursuant to those specific exemptions to the employee's exclusive remedy set forth in subdivision (b) of Section 3602 and Section 4558, the compensation paid under this division shall be credited against the judgement or settlement, and the employer shall be releived from the obligation to pay further compensation to, or on behalf of, the employee or his or her dependents up to the net amount of the judgement or settlement received by the employee or his or her heirs, or that portion of the judgement as has been satisfied.

APPENDIX L

CALIFORNIA LABOR CODE

3602. Exclusive remedy against employer; action for damages; conditions of employer's liability.

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Section 3706, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another of dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

(b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

(3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

(c) In all cases where the conditions of compensation set forth in Section 3600 do not concur. the liability of the employer shall be the same as if this division has not been enacted.

(2)

90-1822

No.

Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JESSE J. SANCHEZ,
Petitioner,
vs.
CITY OF SANTA ANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PREFATORY STATEMENT

Petitioner simply refuses to allow any aspect of this case to rest without multiple judicial challenges. In this Petition, petitioner asks the Court to reconsider the Ninth Circuit Court of Appeals' determination that his prior recovery for permanent stress-related injuries before the California Workers' Compensation Appeals Board ("WCAB") bars his attempt to obtain a second recovery for the _same_ _injuries_. Thus, petitioner seeks to undermine the important policy of judicial finality and repose.

In essence, petitioner asks this Court to grant a writ of certiorari to determine: (1) whether or not an unchallenged decision and award of damages by a state administrative agency is entitled to preclusive effect in a subsequent Section 1983 case, a question which this

Court already answered five years ago, and (2) whether a defense which was not available when the case was filed, but which was raised before the district court (in a brief filed before the damages phase of trial) was raised in a timely manner.

The first issue has already been resolved in University of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220 (1986), and that case is being followed throughout the circuit courts. Nonetheless, after having adjudicated the nature and extent of his alleged emotional injuries, and after having recovered damages for the same alleged injury, petitioner claims that he should be allowed to adjudicate that claim once again so that he can attempt to improve his recovery.

The second issue raised is completely without merit and, in any event, it is clearly not sufficiently "special and important" to warrant this Court's consideration.

Accordingly, for these reasons, explained in more detail below, the Petition should be denied.

STATEMENT OF THE CASE

I. PETITIONER'S HIRING

Jesse J. Sanchez ("petitioner") was employed by the City of Santa Ana Police Department (the "Department") from September 1975 to September 1979. He was hired as part of the Minority Officer Recruitment Effort ("MORE") and the Community-Oriented Policing ("COP") program, which, through the efforts of Chief of Police Raymond C. Davis, made available many new police officer positions during 1973-74, most of which were filled by minorities, primarily Hispanics. [Appendix D.5] Contrary to petitioner's misstatement in his Petition, he was hired as part of these voluntary recruitment programs, not as a result of any court decision, including the district court's decision in *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D. Cal. 1976) (this interim ruling was not made until the year following Sanchez's hire, and the case was not finally resolved until 1978 by consent decree, which did not impose any hiring order on the Department). [Appendix M.7]

II. PETITIONER'S INCREASING PERFORMANCE PROBLEMS

Beginning in August 1978, petitioner's work performance began to decline, as he showed an increasing unwillingness to follow established Department rules and procedures. Petitioner was counseled repeatedly, but showed no improvement. Due to these performance problems, in late February 1979, petitioner was not recommended for continued merit pay. [ER 701-03] He was told at that time that he might lose his present merit pay due to the decreasing level of his work performance. [Appendix D.6] Two weeks later, on March 15, 1979, petitioner left work during the day without completing his shift and with no apparent reason for doing so. [Appendix D.6] Shortly thereafter, petitioner's merit pay steps were officially removed, in accordance with the City's existing procedures. [Appendix D.6] This issue is discussed at length in the City's Cross-Petition for Writ of Certiorari, filed concurrently herewith.

III. PETITIONER'S WORK-RELATED STRESS AND EVENTUAL RESIGNATION

Petitioner then requested and was granted three medical leaves of absence. [Appendix D.7] In March and May 1979, petitioner also filed two separate workers' compensation claims, alleging that he was suffering from work-related stress. The second of those claims was dismissed as being unnecessary and redundant to the first. [ER 916-17]

On September 6, 1979, after four months of medical leave of absence, petitioner wrote the City Personnel Director, stating that his doctor had authorized his return to work and requesting information about his assignment. [Appendix D.7] He was told that he would be in patrol. Then, on September 10, 1979, he wrote another letter stating that his doctor advised that he could perform the patrol assignment, but that he refused to return to work unless his merit pay, which had been removed in accordance with the City Charter and merit pay resolution, was restored immediately. [Appendix D.7] After the City refused his demand, petitioner wrote a third letter in which he resigned, stating that his resignation was a result of the City's refusal to restore his merit pay. [Appendix D.7-8]

IV. PETITIONER'S WORKERS' COMPENSATION RECOVERY

Petitioner then amended his previously filed workers' compensation claim to allege permanent emotional disability. Petitioner also sought recovery under Section 4850 of the California Labor Code, which allows injured police officers to recover a year's leave of absence pay for injury or illness arising in the course of his or her duties. [Appendix N] The Workers' Compensation Appeals Board held a hearing on petitioner's claims on September 20, 1981. Both parties were represented by counsel at the hearing. [ER 1103, 1107] After hearing from both sides, the WCAB determined that it did not have jurisdiction to award the leave of absence pay requested under Section 4850, because Sanchez had resigned. The WCAB did, however, accept jurisdiction over petitioner's remaining claims for permanent emotional injuries. [ER 1103]

Thus, the WCAB awarded petitioner $8,662.50 for his permanent partial disability (30 1/2%) caused by stress-related emotional injuries occurring during his employment, up to September 10, 1979. [ER 1103] Petitioner misstates in his Petition that he was awarded disability only from March to May

1979 -- petitioner may have only worked from March to May 1979, but he was awarded benefits covering the period from March to September, at which time he resigned. Further, because he was compensated for a "permanent disability," he received his emotional distress award for any injuries continuing into the future.

V. PROCEDURAL HISTORY OF CASE

Petitioner and two other Latino Police Officers filed this action in United States District Court, Central District of California, on May 20, 1979,[1] alleging various constitutional and common law claims arising out of their employment and/or the termination of their employment with the Department. [Appendix D.8] Plaintiffs named the City, Chief Davis and sixteen (16) other individuals as defendants.

---

[1] The original parties to this action were: (1) plaintiffs Jesse J. Sanchez, Victor Torres and Robert Caro, and (2) defendants City of Santa Ana, City of Santa Ana Police Department, Police Chief Raymond C. Davis, Personnel Director, Donald Bott, Captain E.B. Hansen, Captain Robert Stebbins, Lieutenant Oliver Lee Drummond, Lieutenant Michael Lewellen, Lieutenant Dale Sterzer, Lieutenant Norwood Williams, Lieutenant Lawrence Pitzer, Sergeant Gary Dixon, Sergeant William Bruns, Sergeant John Collins, Sergeant (continued...)

On June 3, 1983, the district court entered partial summary judgment[2] only in favor of petitioner and only against the City and Chief Davis[3] as to petitioner's procedural due process claim relating to

---

1/ (...continued)
Richard Faust, Sergeant James McDaniels, Sergeant Michael Lanners, and Sergeant John Dittus. The claims of Torres and Caro against all defendants, as well as Sanchez's claims against all defendants except for the City of Santa Ana, were dismissed by the District Court and are the subject of the companion appeal, attached hereto as Appendix O.

[2] Contrary to petitioner's mischaracterization of the record, respondent did dispute the issues stated in petitioner's Motion for Partial Summary Judgment. [ER 939-48; ER 1223-28]

[3] The District Court later exonerated Chief Davis from personal liability. [Appendix D.8]

the removal of his merit pay. [Appendix H.1-2] Then, after a 39-day trial which began in April 1985, the district court determined that the three plaintiffs had failed to present any evidence of discrimination or wrongful treatment. [ER 421-27] In fact, Judge Kenyon stated that the evidence showed they had been treated "with kid gloves," that "no reasonable person could find from the evidence presented that the Department engaged in any discriminatory actions" and that plaintiff Sanchez had used the discrimination laws as a "sword" to "intimidate or harass individuals into conforming their conduct to [his] dictates." [ER 421-27] Thus, on June 18, 1985, the court directed a verdict in favor of the City and all of the individual defendants, with the exception of petitioner's procedural due process claim against the City (relating to the removal of his merit pay) for which partial summary judgment previously had been granted. [Appendix F.9]

In October 1985, the district court began a new trial (with the same jury) for the sole purpose of determining petitioner's damages for the alleged procedural due process violation related to the removal of his merit pay. [Appendix D.9] In pre-trial briefing, the City (respondent herein) argued that petitioner's claim for emotional distress damages was precluded by his previous adjudication and recovery before the WCAB. [ER 1096-99] Only after the district court had rejected the preclusion argument, petitioner approached respondent and asked respondent to agree upon the amount of income that would have been earned by petitioner under various pay steps, and further asked respondent to stipulate that any recovery should be offset by including petitioner's previous workers' compensation recovery, as part of his actual earned income for 1980. [ER 1015] Respondent agreed to this stipulation only because the district court had previously ruled on its preclusion argument, and respondent sought to facilitate a presentation of the evidence. Petitioner mischaracterizes the record in his Petition by stating that "Respondent elected, by stipulation with petitioner, to have the sum received in the WCAB proceeding setoff . . ." (See Petition, p. 53). Respondent never made an "election" between two alternative theories and never abandoned its preclusion argument.

At trial, the jury awarded petitioner $400,000 in back and future pay for a "constructive discharge" because of the alleged procedural due process violation in the manner of his merit pay removal, and $500,000 in damages for emotional distress arising from this procedural due process violation. [Appendix D.9] Contrary to petitioner's misstatement, respondent did present evidence at the trial on damages, by both presenting its own witness and cross-examining petitioner's expert witnesses. Both parties appealed the decision. [ER 453, 454]

On appeal, the Ninth Circuit properly reversed the emotional distress award for petitioner, but affirmed petitioner's $400,000 verdict for the alleged procedural due process violation. [Appendix D.17] The Ninth Circuit determined that because emotional injuries are fully compensable under California's Workers' Compensation Act, and because petitioner had already sought and recovered damages for his emotional injuries in his claims before the WCAB, his emotional distress claim arising from the same circumstances and time period in this action was barred, and he should not have been allowed an opportunity to obtain a double recovery. [Appendix D.17][4] Thus, the Ninth Circuit vacated the jury's $500,000 award for emotional distress damages. [Appendix D.17] Petitioner's Petition for Rehearing before the Ninth Circuit was denied on February 22, 1991, and this Petition for Writ of Certiorari followed. [Appendix E]

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[4] Contrary to petitioner's statement, there is no indication that the Ninth Circuit "ignore[d] the fact that respondent had elected" an offset of petitioner's workers' compensation recovery. In fact, petitioner never raised the allegation that the parties had stipulated to an offset before the Ninth Circuit in this appeal. Moreover, the Ninth Circuit did determine that respondent had not waived its right to assert preclusion. [Appendix D.16]

ARGUMENT

I.

PETITIONER MISSTATES THE NINTH CIRCUIT'S DECISION BELOW - THE NINTH CIRCUIT CORRECTLY HELD THAT PETITIONER'S RECOVERY BEFORE A STATE ADMINISTRATIVE AGENCY PRECLUDES HIS RECOVERY FOR THE SAME INJURY UNDER SECTION 1983

A. THE NINTH CIRCUIT DETERMINED THAT PETITIONER'S RECOVERY BEFORE THE WCAB PRECLUDED A SECOND RECOVERY FOR EMOTIONAL DISTRESS INJURY AND DID NOT RELY UPON THE CALIFORNIA WORKERS' COMPENSATION SYSTEM'S EXCLUSIVITY PROVISION

First, petitioner erroneously argues that the Ninth Circuit's decision was based on the exclusive remedy provision of California's Workers' Compensation Act and that the Court's decision conflicts with other circuits in applying the exclusive remedy provisions of a state's workers' compensation system. (See Petition, pp. 20-28) Plaintiff, however, completely mischaracterizes the basis of the Ninth Circuit's decision, and thus, misstates the primary issue herein.

The Ninth Circuit stated the issue herein as follows: "The City contends that Sanchez's claim in federal court for emotional distress is barred under res judicata principles by his state workers' compensation award. On this point the City prevails." [Appendix D.15-16] Similarly, in reaching its holding, the Ninth Circuit stated, "Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award . . ." [Appendix D.17]

Thus, it is clear that the Ninth Circuit relied on the doctrine of res judicata (or preclusion) in reaching its decision to vacate the jury's award and did not (as Petitioner claims) rely on the irrelevant exclusive remedy provisions of California's Workers' Compensation Act. Put simply, the Ninth Circuit recognized that petitioner elected to pursue a remedy for his alleged work-related emotional injuries through the workers' compensation system, that he obtained a monetary award for a permanent emotional disability without having to prove fault, and that he should not be allowed an opportunity to improve his award for the same injury in a subsequent federal court action.

Second, in his attempt to show that he is entitled to a second recovery under Section 1983, petitioner also misstates and mischaracterizes the entire nature of the workers' compensation system by describing it as a system of "limited compensation" in which there is no opportunity to raise "fault-based claims." Rather, workers' compensation provides an opportunity for employees to recover fully for their work-related physical and emotional injuries, without regard to negligence or fault. See, e.g. Cal.Lab.Code § 3600. Thus, workers' compensation allows an employee such as petitioner to avoid having to prove fault in order to facilitate complete recovery -- it does not, as petitioner argues, prevent the employee from asserting "fault-based" claims.

Petitioner's attack on the workers' compensation system, based on his unsupported claim that it denies a plaintiff's federal rights, is completely without merit. This Court upheld the constitutionality of workers' compensation systems and the important policies enforced by such systems long ago. Middleton v. Texas Power & Light Co., 249 U.S. 152, 163, 39 S.Ct. 227, 230-31 (1919). Moreover, plaintiff erroneously states that the holding of Howlett v. Rose, ___ U.S. ___, ___, 110 S.Ct. 2430, 2443 (1990), is inconsistent with the exclusive remedy provision of a workers' compensation system. This is, at best, a twisted reading of Howlett. In fact, Howlett did not discuss workers' compensation exclusivity at all. Rather, in Howlett, this Court addressed whether a state law could prohibit federal claims while allowing a plaintiff to bring similar state claims. In holding that such a state statute which specifically discriminated against federal claims was unconstitutional, the Court also stated that it "must act with utmost caution" before challenging a neutral state rule which denies a federal right. Howlett, ___ U.S. at ___, 110 S.Ct. at 2440. Workers' compensation remedies are part of a "neutral state rule," and petitioner presents no basis in this case to challenge the remedies he voluntarily chose to pursue under California's workers' compensation system.

In sum, petitioner's first argument as to why this Court should grant a writ of certiorari is crucially flawed for at least two reasons: (1) the Ninth Circuit did not rely primarily on the exclusivity provisions of California's Workers' Compensation Act to reach its decision, and (2) there is no basis for contending that the remedial provisions of California's workers' compensation system, to which petitioner voluntarily availed himself, conflict with the remedies otherwise available under Section 1983.

B. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S RULE CONCERNING THE PRECLUSIVE EFFECT OF A STATE ADMINISTRATIVE DECISION IN A SUBSEQUENT SECTION 1983 ACTION

Petitioner's second argument as to why this Court should issue a writ of certiorari is that the Court should determine whether claim preclusion should apply to an administrative agency's findings in a subsequent Section 1983 suit. Petitioner ignores the fact, however, that this issue has already been decided by the United States Supreme Court, and this Court's rule is being followed by the circuit courts.

Through a series of recent decisions, this Court has established the rules to determine the preclusive effect of a state administrative agency's decision in a case subsequently brought in federal court. First, in Kremer v. Chemical Construction Corp., 456 U.S.

461, 102 S.Ct. 1883 (1982), this Court determined that under 28 U.S.C. § 1738, a federal court deciding a Title VII claim must give preclusive effect to a decision of a state court which upheld a state administrative agency's finding of no discrimination.

Second, in Migra v. Warren City School Dist., 465 U.S. 75, 104 S.Ct. 892 (1984), this Court determined that a state court's judgment reviewing an administrative decision would have the same preclusive effect in a subsequent Section 1983 action that the state court would give the decision. Thus, in these two cases, the Court established that state administrative determinations were generally entitled to preclusive effect, in some cases depending upon the applicable state law. Furthermore, neither of these two decisions made any distinction between "claim preclusion" and "issue preclusion."

Then, in University of Tennessee v. Elliott, 478 U.S. 788, 796-99, 106 S.Ct. 3220, 3225-3226 (1986), this Court answered the exact question which petitioner has presented herein. In Elliott, this Court held that when a state administrative agency acts in a judicial capacity and resolves disputed issues, the federal court deciding a subsequent Section 1983 claim should give the same preclusive effect to the agency's decision -- even if it is unreviewed by a state court -- as would be given under state law:

> "Accordingly, we hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' (citation), federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts."

Id., 478 U.S. at 799, 106 S.Ct. at 3226.

In Elliott, the Court discussed the important policies which favor giving preclusive effect to administrative decisions. In particular, the Court focused on the need for judicial finality and repose, and the policies of avoiding repetitive litigation and conserving judicial resources. Elliott, 478 U.S. at 798-99, 106 S.Ct. at 3226. Moreover, this Court very recently reaffirmed the presumption generally favoring administrative preclusion. In Astoria Federal Savings & Loan Assoc. v. Solimino, ___ U.S. ___, ___ S.Ct ___, 59 U.S.L.W. 4616 (June 10, 1991),[5] although the Court found that state administrative decisions should not be given preclusive effect in ADEA actions, the Court stated:

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[5] In Astoria, the Court also reiterated that the reasoning favoring administrative preclusion particularly applies in Section 1983 claims (as opposed to Title VII and ADEA claims). Id., 59 U.S.L.W. at 4617.

> "We have long favored application of the common-law doctrine of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. . . . To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution."

Id. (emphasis added).

Elliott's holding regarding the preclusive effect of state administrative decisions has also been followed throughout the circuit courts. See e.g., Fondel v. Grumman Aerospace Corp., 884 F.2d 657, 658-59 (2nd Cir. 1989) (following Elliott, yet denying preclusive effect to administrative decision due to New York law); Barnes v. McDowell, 848 F.2d 725, 730 (6th Cir. 1988) cert. denied, 488 U.S. 1007 (1989) (following Elliott, yet determining no preclusive effect to

Personnel Board's determination under state law); Stillians v. State of Iowa, 843 F.2d 276, 281, n.3 (8th Cir. 1988) (implying that under Elliott and in order to enforce policy of "repose," federal courts should apply res judicata to administrative decisions); Eilrich v. Remas, 839 F.2d 630, 632-33 (9th Cir. 1988), cert. denied, 488 U.S. 819, 109 S.Ct. 60 (1988)[6/] (following Elliott and holding that district court appropriately applied California law to give preclusive effect to administrative decision in subsequent Section 1983 action); Amoco Production Co. v. Heiman, 904 F.2d 1405, 1415 (10th Cir. 1990)

[6/] This Court has previously denied a petition for writ of certiorari which raised the same question presented for review herein. In Eilrich, 488 U.S. 819, 109 S.Ct. 60 (1988), Docket No. 87-1895, one question presented was "whether unreviewed legal conclusions of state agencies must be given collateral estoppel effect in subsequent actions under 42 U.S.C. § 1983." Id.

cert. denied, 111 S.Ct. 350 (1990) (following Elliott and determining that under state law administrative agency's determination is entitled to preclusive effect); Buckhalter v. Pepsi-Cola General Bottlers, Inc., 820 F.2d 892, 895 (7th Cir. 1987) (following Elliott and holding that determination by state Human Rights Commission was entitled to preclusive effect in Section 1983 claim); cf., Gjellum v. City of Birmingham, 829 F.2d 1056, 1062 (11th Cir. 1987) (holding that under Elliott, the federal court must apply state issue preclusion rules, but not claim preclusion rules).

Petitioner voluntarily sought a remedy before the WCAB for the same emotional distress injury claimed in the action before the district court. The WCAB made findings of fact and determined the nature and extent of petitioner's injury. Based upon the above decisions, petitioner cannot now sidestep the WCAB's findings and relitigate his alleged emotional distress injury in an attempt to obtain a more lucrative award.

Thus, despite petitioner's attempts to confuse the issue by distinguishing between "claim preclusion" and "issue preclusion,"[7/] the Ninth Circuit herein applied the correct rule adopted by this Court and accepted by the circuit courts, when it held, "Whether Sanchez's compensation award for emotional injuries bars under res judicata principles his section 1983 claim for damages for emotional distress is answered by state law." [see Appendix D.17 (emphasis added)]

[7/] In its recent decision concerning the preclusive effect of a state administrative agency's decision in a subsequent ADEA action, this Court (as in its previous decisions) rejected any distinction between "claim" and "issue" preclusion. Astoria, ___ U.S. at ___, ___ S.Ct. at ___, 59 U.S.L.W. at 4617.

C. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT, UNDER CALIFORNIA LAW, PETITIONER'S RECOVERY HEREIN IS BARRED BY EITHER CLAIM OR ISSUE PRECLUSION

California courts apply the following rule to determine whether a subsequent case is barred under claim preclusion: "a judgment for the defendant is a bar to a subsequent action by the plaintiff on the same injury to the same right, even though he presents a different legal ground for relief." Slater v. Blackwood, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226 (1975) (citations omitted) (emphasis in the original).

Moreover, the California Supreme Court has stated that a prior judgment bars relitigation "on matters which were raised or could have been raised, on matters litigated or litigable." Busick v. Workmen's Compensation Appeals Board, 7 Cal.3d 967, 975, 104 Cal.Rptr. 42, 48

(1972) (emphasis added) (holding that assault and battery judgment bars second recovery under workers' compensation system). Thus, the Ninth Circuit herein correctly determined that under California law, petitioner's claim for emotional distress injuries arising out of his employment were "litigable" before the WCAB, and thus his WCAB recovery for emotional injuries precluded a second recovery on the same claim, citing California Labor Code § 3601 and Hollywood Refrigeration Sales Co., Inc. v. Superior Court, 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). [Appendix D.17]

The California Supreme Court has similarly defined issue preclusion as follows:

> ". . . a party will be collaterally estopped from relitigating an issue only if (1) the issue decided in a prior adjudication is identical with that presented in the action in

> question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication."

Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 874, 151 Cal.Rptr. 285, 288 (1978).

The record establishing the elements of both claim and issue preclusion, and thus establishing the preclusive effect of petitioner's workers' compensation recovery, is clear:

1. In his action before the WCAB, petitioner raised his claims regarding his alleged emotional, stress-related injuries arising from his employment from March to September 1979. [ER 1103]
2. Petitioner's emotional distress claims arose from his employment, and thus, were

recoverable before the WCAB. [ER 1103]

3. The WCAB held a hearing regarding the nature and extent of petitioner's emotional, stress-related injuries arising out of his employment with respondent. [ER 1103]
4. Both petitioner and respondent were parties to the WCAB action and were present at the hearing. [ER 1103]
5. The WCAB awarded petitioner damages for his permanent disability caused by his emotional injuries. [ER 1103]
6. The WCAB award became final when petitioner chose not to appeal the decision to the California courts. [Appendix D.7]

Petitioner, however, mischaracterizes the record by arguing that the "state court was unable to address the merits of the claim" and "the state tribunal ruled that it lacked jurisdiction or authority to decide some or all of the claims or issues before it." (See Petition, pp. 41-42). The record belies these statements in at least three crucial ways.

First, petitioner was not "barred for jurisdictional reasons" from presenting the emotional distress claims that are the subject of this case. The emotional distress damages which petitioner sought in his Section 1983 action were for respondent's conduct during the period from March to September 1979.[8/]

[8/] By virtue of the district court's grant of summary judgment on the procedural due process claim and its dismissal of all other claims, the sole possible basis for petitioner's claim for emotional injuries under his Section 1983 claim (continued...)

This is precisely the claim which was both brought before the WCAB and decided by the WCAB. The WCAB determined that it "lacked jurisdiction" only to award petitioner leave of absence pay. [ER 1103, 1107] The WCAB did, however, compensate petitioner for a "permanent disability," thus not only covering petitioner's emotional injuries from March to September 10, 1979, but also projecting that recovery into the future. Similarly, the emotional injury claim petitioner pursued in the district court was based upon his alleged injuries occurring during his employment with the Department up through September 10, 1979. In sum, contrary to petitioner's claims,

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8/ (...continued)
was the removal of his merit pay steps which occurred in the March to September 1979 time frame. This is the same time period for which petitioner sought and obtained full recovery for his permanent emotional distress injuries in the WCAB hearing.

the WCAB fully compensated him for his emotional injuries.

Petitioner's attempts to distinguish Migra, 465 U.S. 75, 104 S.Ct. 892, are entirely disingenuous. Like the plaintiff in Migra, petitioner herein sought and obtained recovery for conduct which allegedly occurred prior to his resignation, and the recovery took into consideration his continuing "permanent disability," thus compensating him for the period following his resignation. Likewise, the jury's award also considered petitioner's permanent emotional injuries, and compensated him therefor. Thus, as in Migra, petitioner was compensated for the entire period of his alleged injuries, and the Ninth Circuit properly recognized that he should not have been allowed to pursue a second recovery and obtain a second award for the same injury.

Second, petitioner erroneously argues that the WCAB did not consider the "merits" of petitioner's emotional distress claim. Indeed, the only issue which the WCAB did decide on the merits is the same issue for which petitioner sought emotional distress damages under Section 1983. Simply put, the WCAB determined whether petitioner suffered emotional distress and stress-related injuries as a result of his employment with respondent. That is precisely the "merits" of petitioner's claim for emotional distress under Section 1983.

Third, petitioner erroneously (and surprisingly) argues that he was not entitled to recover any emotional distress damages in his action before the WCAB. (See Petition, pp. 45-46) This ludicrous argument ignores the fact that petitioner sought an award, and the WCAB did, in fact, award petitioner damages for his emotional and stress-related injuries. This argument also ignores the fact that petitioner has never tendered back his WCAB recovery to the City after suddenly discovering that he allegedly was "not entitled" to a WCAB recovery.

In sum, the Ninth Circuit correctly determined that under California law, petitioner's recovery before the WCAB barred his second recovery on the same claims for emotional distress injuries. Thus, petitioner misstates both the law and the facts when he argues that he "has been effectively left without any remedy at all for any emotional distress or injuries for the period commencing in May 1979 and thereafter." This is precisely the remedy that petitioner received from the WCAB.

II.

PETITIONER (1) MISSTATES THE LAW AND THE FACTS REGARDING THE SECONDARY ISSUE HEREIN BY ARGUING THAT RESPONDENT DID NOT PROPERLY RAISE THE DEFENSE OF PRECLUSION; AND (2) MISSTATES THE IMPORTANCE OF THE ISSUE

A. RESPONDENT DID RAISE IN A PROPER AND TIMELY MANNER THE ISSUE OF THE PRECLUSIVE EFFECT OF PETITIONER'S PRIOR RECOVERY FOR THE SAME ALLEGED INJURY

Petitioner has both misstated the record and miscited authorities to argue that respondent did not timely raise the defense of preclusion.

1. PETITIONER MISSTATES THE RECORD

First and foremost, respondent did raise the defense of preclusion before the damages phase of the trial, at which time the issue became ripe. Respondent asserted its position that petitioner was precluded from recovery in its pre-trial

"Brief re. Allowable Damages." [ER 1096-99; Appendix D.17] Thus, the district court was given an opportunity to rule upon the preclusion issue before the trial on damages, and petitioner has misstated the facts and attempted to mislead the Court by stating that respondent did not afford "the district court the opportunity to rule upon [the defense] prior to post-trial motions. . . ." (See Petition, p. 53).

Second, petitioner erroneously states that respondent "elected" to reduce petitioner's award in the district court by his WCAB recovery (apparently arguing that this alleged "election" amounted to a waiver of the preclusion defense). (See Petition, p. 53). Petitioner never raised this issue on appeal before the Ninth Circuit; accordingly, the alleged "election" likewise cannot be raised in this

Petition. Moreover, petitioner misstates the record. Contrary to petitioner's attempt to show that respondent abandoned its preclusion argument, respondent simply agreed to stipulate to an amount petitioner had earned for 1980 (which included the WCAB recovery [ER 1015]) in order to avoid a costly and time-consuming trial on damages; this stipulation was reached, however, only after the district court had rejected respondent's claim that petitioner's emotional distress recovery was entirely precluded. Respondent's stipulation was in no way an abandonment or waiver of its preclusion defense.

Third, petitioner fails to mention two key facts herein: (1) respondent could not raise the defense of the preclusive effect of the WCAB award when it filed its Answer in 1979 because the WCAB did not reach a decision until two years later, and (2) because respondent raised the defense before the trial on damages, the defense was actually litigated at the damages phase of the trial. These two facts establish (as the Ninth Circuit determined) that respondent did raise the defense in a timely manner.

2. THE AUTHORITIES CITED ARE INAPPOSITE

Petitioner argues that the "Ninth Circuit has placed itself at odds with several other circuits" (emphasis added) and then proceeds to cite only two cases, both of which are distinguishable from the case at bar.

First, in Home Depot, Inc. v. Guste, 773 F.2d 616, 620-21 n.4 (5th Cir. 1985), the Court stated in a footnote that because the appellant had never raised the defense of preclusion, the court would not consider whether it was applicable in that case. Respondent herein, on the other hand, did raise the defense and raised it before the trial on damages (when the issue became significant). [ER 1096-99; Appendix D.17] Moreover, Home Depot involved the preclusive effect of a recent Supreme Court decision, and not the preclusive effect of plaintiff's prior recovery, which was the issue decided herein. Thus, Home Depot is clearly distinguishable on its facts, and the holding is inapplicable herein.

Second, in State Farm Mutual Auto Ins. Co. v. Mid-Continent Casualty Co., 518 F.2d 292, 296 (10th Cir. 1975), the preclusive effect of a prior judgment was not even an issue. Rather, at issue in State Farm was the defense of estoppel under a particular rule of insurance law. Moreover, in State Farm, the defense was not raised at trial, whereas respondent herein did raise the issue at the damages phase of the trial.

Finally, petitioner miscites two inapplicable Ninth Circuit decisions to argue erroneously that the decision herein is "at odds" with other Ninth Circuit decisions. Contrary to petitioner's assertion, United States v. First Nat. Bank of Circle, 652 F.2d 882, 886-87 (9th Cir. 1981) did not hold that a theory which was not included in a pre-trial order could never be tried. Rather, in First Nat. Bank, the court merely accepted the respondent's argument that the theory both was not included in the pre-trial order and contradicted the facts stated in the pre-trial order. Id. The Court also stated, however, that pre-trial orders should be liberally construed. Id. The preclusion defense herein, however, did not contradict the facts of any pre-trial order -- although not mentioned in the pre-trial order, it was undisputed that petitioner had sought and gained recovery before the WCAB.

Likewise, Wood v. Sunn, 865 F.2d 982, 987 (9th Cir. 1988) is inapplicable. Unlike defendant in that case, respondent herein did present the defense to the district court before the trial on damages, whereas the holding in Wood v. Sunn was based on the failure to raise the defense before trial.

Thus, for the above reasons, as well as petitioner's mischaracterization of the record and authorities, the Court should deny the Petition on the second question presented.

B. THE ALLEGED FAILURE TO TIMELY RAISE THE DEFENSE OF PRECLUSION IS NOT AN "IMPORTANT ISSUE" DESERVING OF A WRIT OF CERTIORARI

"A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Rules of the United States Supreme Court, Rule 10.

Respondent's alleged failure to timely raise the preclusion defense, a contention which the Ninth Circuit rejected, is not the sort of "special and important" issue that needs resolution by the United States Supreme Court. Moreover, as explained above, petitioner has exercised license with the legal authorities cited above in a misguided attempt to show that a "conflict" exists among the circuit courts, and that this is an issue worthy of Supreme Court review. Likewise, petitioner has attempted to manufacture an important issue by mischaracterizing the Ninth Circuit's decision herein as a "rule," when in fact, the Ninth Circuit recognized the general rule that preclusion must be pleaded, but also determined that the specific circumstances of this case warranted an exception to that rule. [Appendix D.17] This is just another example of petitioner's unwillingness to accept any adverse ruling without multiple challenges.

In short, this is not the sort of question which this Court should spend its limited and valuable time and resources deciding.

III.

PETITIONER'S THIRD QUESTION PRESENTED IS MOOT DUE TO THE NINTH CIRCUIT'S RECENT DECISION ON REHEARING OF THE COMPANION CASE OF SANCHEZ V. CITY OF SANTA ANA

Shortly after petitioner filed this Petition for Writ of Certiorari, the Ninth Circuit on rehearing in Sanchez II awarded petitioner the requested attorney's fees. [Appendix O] Accordingly, the third question presented herein is now moot.

CONCLUSION

In sum, petitioner asks this Court to give him a "second bite at the apple" by reversing the Ninth Circuit's determination that petitioner's recovery before the WCAB bars a second recovery for the same injury. Moreover, petitioner misstates the basis of the decision below and asks this Court to reopen an issue which was settled five years ago with this Court's decision in University of Tennessee v. Elliott. For the reasons set forth above, respondent respectfully requests that the Court deny this Petition for Writ of Certiorari.

DATED: June 23, 1991

Respectfully submitted,

CHARLES W. MATHEIS, JR.
BEAM & BROBECK

By:______________________
Charles W. Matheis, Jr.

Attorneys for Respondent
City of Santa Ana

APPENDIX M

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, LAWRENCE FELIX, NARCISO ARCE, and EFREN LOZANO, Individually, and on behalf of all others similarly situated, Plaintiffs, v. THE CITY OF SANTA ANA, A Municipal Corporation, JERRY M. PATTERSON, in his official capacity as Mayor of the City of Santa Ana, BRUCE C. SPRAGG, in his official capacity as City Manager of the City of Santa Ana, DONALD BOTT, in his official capacity as Fire Chief of the City of Santa Ana, and RAYMOND C. DAVIS, in his official capacity as Police Chief of the City of Santa Ana, Defendants.	C.A. NO. CV 74-767-F SECOND CONSENT DECREE AND FINAL JUDGMENT

Plaintiffs filed a complaint herein on March 23, 1974, alleging that defendants have engaged in employment discrimination based on race and national origin. A trial has been held herein resulting in a decision and opinion reported at 410 F.Supp. 873, supplemented by a subsequent decision reported at 13 FEP Cases 1019, 13 E.P.D. ¶11,308. An interlocutory appeal taken by the defendants has been dismissed by the Ninth Circuit Court of Appeals by order dated September 28, 1977.

By a consent decree entitled "Consent Decree in Partial Settlement of Action," entered on December 16, 1977, most, but not all issues in this lawsuit were settled. The instant Second Consent Decree constitutes a settlement of all remaining issues between the parties at the District Court level. Defendant, however, reserves the right to appeal a single ruling.

The defendants enter into the instant consent decree without admitting liability of the validity of any of plaintiffs' claims. This decree is entered into as a partial settlement of an existing dispute, and defendants do not admit that there is or has been any violation of any law, rule, or regulation. Nothing herein shall require the employment, promotion or selection of less qualified persons over more qualified persons as determined by valid selection criteria, nor require employment of persons who do not meet valid qualification standards, nor require displacement of incumbent employees or hiring of unneeded employees.

Declarations by counsel filed herein show that notice to class members of the instant decree has been carried out. No objections to the settlement have been made.

On December 20, 1974, Lawrence Felix was certified as class representative. The represented class herein is as follows:

> "(a) all Mexican-Americans who have applied for employment as police officers or firefighters with the defendant City of Santa Ana within three years of the commencement of this action; (b) all Mexican-Americans who presently are applicants for such employment; and (c) all Mexican-Americans who may apply for such employment in the future, who apply during the effective term of any final decree this Court may issue . . ."

The term "Mexican-American" as used in this Consent Decree shall be interpreted to mean any person who has a "Spanish surname" or is "Spanish language" as those terms are utilized by the United States Department of Commerce, Bureau of the Census, in the 1970 United States Census.

The Court has reviewed this Second Consent Decree and Final Judgment of Lawsuit and the Declaration of Plaintiffs' counsel submitted concurrently herewith and has determined that the provisions herein are fair and reasonable to all parties and the represented class.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs shall seek no back pay claims for class members Peter Jimenez, Mike Alvarez, and John Sierra. Defendants shall offer firefighter positions to these three class members, as vacancies occur, provided the above-named three class members successfully

complete the remaining portions of the selection process, i.e., the medical examination and background check.

2. Defendants may appeal only this Court's ruling on the issue of whether the "Form 45" Fire Aptitude Test has been shown to be job-related or validated according to the requirements of the law. Neither plaintiffs nor defendants shall appeal any other issue, including the issue of whether the "Form 45" test had an adverse impact upon Mexican-American applicants.

3. Plaintiff Felix shall receive $500 in full and complete satisfaction of all claims he may have against defendants.

4. This District Court already has ruled at pages 74 and 75 of the

Memorandum Opinion, filed March 12, 1976, that a hiring order shall be entered herein for both police officer and firefighter positions. The Court, however, left to future proceedings, or to Court-approved stipulation of the parties, a determination of the extent and duration of that hiring order. By stipulation the hiring orders shall be as follows:

a. No hiring order shall be entered for police officer positions;

b. During any calendar year, defendants shall engage in good faith efforts to insure that no less than approximately

30% of all new appointees into firefighter positions shall be Mexican-Americans until such time as 23% of the entire uniformed workforce in the Santa Ana Fire Department is Mexican-American;

5. Defendants shall file an annual report with the Court, and serve a copy upon plaintiffs' attorneys, on the second Monday in January of each year that the hiring order remains in effect, beginning January, 1980. The report shall set forth:

    a. The total number of persons hired into the Santa Ana Fire Department during the immediately preceding calendar year;

b. The total number of Mexican-Americans hired into the Fire Department during the immediately preceding calendar year;

c. The total number of uniformed employees in the Fire Department as of the date of the report; and

d. The total number of uniformed employees in the Fire Department who are Mexican-American as of the date of the report.

6. Plaintiffs shall take no action concerning a breach of the provisions of Paragraph 5 absent giving defendants thirty days notice and opportunity to cure the breach.

7. The Court shall retain jurisdiction of this lawsuit and this Consent Decree shall remain in force and effect until dissolved. Once the percentage of Mexican-Americans in the entire uniformed workforce in the Santa Ana Fire Department reaches 23%, the Court shall, upon the motion of defendants, or any of them, and with no further cause shown, order this Consent Decree dissolved.

8. The back pay and other relief to be received by all identifiable class members, other than Plaintiff Felix and the class members mentioned in paragraph one above, shall be as set forth on the attached Appendix "A".

9. Paragraph 10 of the first Partial Consent Decree provided that plaintiffs' counsel could seek an additional costs and fees award for work done at the District Court level subsequent to entry of the first Partial Consent Decree. That paragraph 10 also provided that Plaintiffs' counsel could seek an additional costs and fees award for work to be done on any appeal on the condition that plaintiffs were the

prevailing party on the appeal. Paragraph 10 of the prior Consent Decree shall be modified as follows:

a. A. Thomas Hunt and the other attorneys employed by the Center for Law in the Public Interest shall reduce their claim of approximately $3,000 for costs and attorneys' fees for all time expended on this case after entry of the first Partial Consent Decree on December 16, 1977, and before entry of the instant Consent Decree, to a sum of $1,000.

b. Walter Cochran-Bond shall reduce his claim of approximately $10,000 for costs and attorneys' fees for time expended on this case after entry of the first Partial Consent Decree on December 16, 1977, and before entry of the instant Second Partial Consent Decree, to a sum of $6,500.

c. If defendants succeed on any appeal of the "Form 45" validation issue, plaintiffs' counsel shall receive no costs or fees for work done on the appeal. If plaintiffs, however, prevail on the appeal, plaintiffs' counsel shall be entitled to a costs and fees award, provided that plaintiffs' counsel shall not seek more than $5,000 for their costs and fees for work done on the appeal. This $5,000 limitation shall not be applicable should this case be accepted for review by the United States Supreme Court.

DATED: November , 1978

WARREN J. FERGUSON
United States District Judge

CONSENTED TO:

A. THOMAS HUNT
TIMOTHY B. FLYNN
Center for Law in the Public Interest

WALTER COCHRAN-BOND

PAUL BRYAN GRAY

By________________________________
A. THOMAS HUNT

Attorneys for Plaintiffs

KEITH L. GOW, City Attorney
EDWARD J. COOPER, Assistant City Atorney
CARRIE MACMILLAN, Deputy City Attorney

By________________________________
CARRIE MACMILLIN

Attorneys for Defendants

RELIEF OBTAINED BY IDENTIFIABLE MEMBERS OF THE PLAINTIFF CLASS

Michael Alvarez - potential job offer

Narciso Arce - job offer - appointed January, 1977; backpay - $7,950.31

John Delgado - backpay - $12,803.37

Ernest Hernandez - job offer - declined, employed as firefighter by City of Chula Vista; backpay - $8,853.50

Peter Jiminez - potential job offer

Efren Lozano - job offer - appointed January, 1977; backpay - $8,513.47

Andrew Montoya - backpay - $10,539.11

Richard Rodriguez - backpay - $3,969.50

John Sierra - potential job offer

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al. Plaintiff(s)	)	CASE NUMBER CV 74-767-F
vs.	)	NOTICE OF ENTRY
CITY OF SANTA ANA, et al. Defendant(s)	)	

TO THE ABOVE NAMED PARTIES AND TO THEIR ATORNEY(S) OF RECORD:

You are hereby notified that a second consent decree & final judgment

____

____

__________________ in the above entitled case was entered in the docket on

November 7, 1978.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on ______November 7______, 1978, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Paul B. Gray
1042 West Santa Ana Blvd., Ste. C
Santa Ana, CA 92703

Theodore A. Johnson
401 Civic Center Dr., West
Suite 570
P.O. Box 324
Santa Ana, CA 92702

Frank J. Fekete
Deputy City Attorney
20 Civic Center Plaza
Santa Ana, CA

EDWARD M. KRITZMAN, CLERK

By Katherine M. Clatanoff
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEAL IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

APPENDIX N

[illegible]

By [illegible]
Deputy Clerk

NOTE:

IN CASES ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, [illegible] OF APPEAL FROM [illegible] MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

CALIFORNIA LABOR CODE SECTION 4850

§ 4850. Law enforcement officers, firefighters and lifeguards; leave of absence with salary in lieu of temporary disability payments; duration of section.

Whenever any city policeman, harbor policeman of any harbor district, city, county, or district firefighter, sheriff or any officer or employee of a sheriff's office, any inspector, investigator, detective, or personnel with comparable title in any district attorney's office, or lifeguard employed year round on a regular, full-time basis by a county of the first class, who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city or county, or district, to leave of absence while so disabled without loss of salary in lieu of temporary disability payments, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until such earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3 of the Labor Code. This section shall apply only to city policemen, harbor district policemen, sheriffs, or any officer or employee of a sheriff's office, and any inspector, investigator, detective, or personnel with comparable title in any district attorney's office, who are members of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service, and excludes employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service. It shall also apply to city, county, or district firefighters who are members of the Public Employees'

Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes employees of the city fire department, county fire department, and of any fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service. It shall also apply to deputy sheriffs subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Codes). It shall also apply to lifeguards employed year round on a regular, full-time basis by counties of the first class who are subject to the

County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code). If the employer is insured, the payments which, except for the provisions of this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

This section shall remain in effect only until January 1, 1990, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1990, deletes or extends that date.

APPENDIX O

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jesse J. Sanchez; Victor Torres; Robert Caro,
Plaintiffs-Appellants,

v.

City of Santa Ana; City of Santa Ana Police Department; Don Botts; Raymond C. Davis; E. B. Hansen; Robert Stebbens; Norwood Williams; Lee Drummond; Lawrence Pitzer; Michael Lewellen; Dale Sterzer; Gary Dixon; John Collins; John McDaniels; Michael Lanners; William Bruns; John Dittus; Richard Faust; John McClain,
Defendants-Appellees.

Nos. 85-6504;
86-6226, 87-5614,
88-5853

D.C. No.
CV-79-1818-KN

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990
Amended May 24, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

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*Judge Irving Hill, District Judge for the Central District of California, presided over many of the pretrial orders.

COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

ORDER

The order and amended opinion filed February 27, 1991 is amended as follows:

Slip op. at 2216, line 7, following "fees": insert a comma after the word "fees" and then insert "including fees on appeal,"

Slip op. at 2216, line 9, following "(9th Cir. 1990).": insert: "The district court shall determine the amount of fees that can be attributed to the part of Sanchez's appeal that was successful, and shall award reasonable attorney's fees and costs to the extent of Sanchez's success, both for the work in the district court and on appeal."

Slip op. at 2216, 1st full paragraph: delete: "The parties will bear their own costs of appeal."

With these amendments the petition for rehearing is denied. Judges Schroeder and O'Scannlain have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Plaintiff's request for an extension of time within which to file a motion for attorneys' fees is now moot. This order has resolved the issue of attorneys' fees.

The mandate in this case is stayed for 90 days to permit the preparation and filing of a petition to the Supreme Court.

OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. *See generally League of United Latin Am. Citizens (LULAC) v. City of Santa Ana,* 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examination, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "super-sensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that various defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were assigned to LPOA members and that they did not receive adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, however, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez*, slip op. at _.

On May 18, 1979, Sanchez, Torres and Caro filed a complaint seeking damages and injunctive relief for violations of their civil rights.[1] Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

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[1] On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's complaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded $471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

JURISDICTION

All but five of the defendants[2] contend that this court lacks jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not timely appeal from the certified judgment. We reject this contention.[3]

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[2] Defendants Collins, Dittus, Faust, Lanner and McDaniel.

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).[4]

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

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[3] A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

[4] Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.[5]

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[5] The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means non-clerical errors; it is not referring to the magnitude of the error. *Waggoner*, 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky*, 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, _ U.S. _, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. *See Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*, _ U.S. _, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions,

have a discriminatory impact on Hispanic officers hired laterally from other police departments.[8] Plaintiffs challenge the district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionally few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

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[8] Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai,* 866 F.2d 1175 (9th Cir.), *cert. denied,* _ U.S. _, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.,* 780 F.2d 776, 779 (9th Cir.), *cert. denied,* 476 U.S. 1170 (1986).

CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by res judicata. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the res judicata defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara,* 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk,* 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable res judicata and collateral estoppel principles, *Punton v. City of Seattle,* 805 F.2d 1378, 1380 (9th Cir. 1988), *cert. denied,* 481 U.S. 1029 (1989), res judicata precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo,* 775 F.2d at 1366, (citing *Slater v. Blackwood,* 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. *See Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer*, 456 U.S. at 461 (claim and issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd, Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

A. *Discriminatory Environment*

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment. . . . . This is a mischaracterization of the record. We affirm judgment to the defendants.

Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union*, _ U.S. _, 109 S. Ct. 2363, 2374-75 (1989). Title VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.[7]

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. *See Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *cf. Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied*, __ U.S. __, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.

Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous standard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed de novo. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.

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[7] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

B. First Amendment Claims

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, and Lieutenant Williams to Sanchez,[8] and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122-23 (1988). Plaintiffs failed to prove the existence of such a policy or custom.

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[8] In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. *See Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990.)

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. *See Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.*, 391 U.S. 563 (1968); *Allen v. Scriber*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (1987).

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. *See Allen*, 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized in his interview for the ATL position and received poor reviews. These claims of first amendment retaliation are therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick,* 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering,* 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen,* 812 F.2d at 432; *Boyd v. Gain,* 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied,* 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

C. *Discrimination/Retaliation*

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants violated sections 1981, 1983, and Title VII by retaliating against them because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.[9] There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

D. *Conspiracies*

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstruct justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class race-based animus. *See Kush,* 460 U.S. 719; *Griffin v. Breckenridge,* 403 U.S. 88 (1971); *Bretz v. Kelman,* 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. *See Arnold v. IBM,* 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 626 (9th Cir. 1988).

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[9] Our decision to vacate the award of $500,000 for emotional distress injury because it is barred by principles of res judicata, *see Sanchez*, 915 F.2d at 431-32, does not affect our decision here.

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by res judicata. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.[10]

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[10] Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id. See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. *See Connick v. Myers*, 461 U.S. 138 (1983)("for at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds*, _ U.S. _, 109 S. Ct. 1736 (1989); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied*, 449 U.S. 875 (1980); *Rogers*, 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). *See also Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen,* two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the *LULAC* litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights suit is a prevailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " *Texas State Teachers Ass'n v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees, including fees on appeal, in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990). The district court shall determine the amount of fees that can be attributed to the part of Sanchez's appeal that was successful, and shall award reasonable attorney's fees and costs to the extent of Sanchez's success, both for the work in the district court and on appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.